AMERICAN BAR ASSOCIATION
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• Current Events •

Board of Governors Decides on Referendum on Plan to Reorganize Federal Judiciary—Result Will Control Action and Attitude of Association on Each Proposal

FOLLOWING is the letter sent to each member of the Association announcing the referendum on the various proposals in respect to the Federal Judiciary. The letter was accompanied by the full text of the measure and the official ballot.

TO THE MEMBERS OF THE AMERICAN BAR ASSOCIATION:

The Board of Governors, composed of one member elected from each Federal Judicial Circuit together with your National officers, has decided that a referendum vote of the members of the Association shall determine the opinion and attitude of the Association with respect to the pending proposals as to the Federal judiciary. Many members of your House of Delegates have joined in the decision that questions of such far-reaching importance to the country, as well as to the profession, should be passed on by our whole membership.

The six major proposals affecting the Federal Courts, particularly the Supreme Court, have been formulated and placed upon the official ballot, which is attached hereto and should be detached and returned.

In order that your officers, Board of Governors, and House of Delegates, may have promptly the instructions and guidance which will come from a full expression of the opinions of our 30,000 members upon the pending proposals, you are asked to detach and mark your ballot to indicate your vote upon each of the submitted questions, and to mail such ballot *immediately* in the enclosed envelope, without placing on the ballot or the ballot-envelope any identifying marks of any kind. No ballot received after March 10, 1937, can be counted.

The ballots will be counted and tabulated under the supervision of your Board of Elections, of which the Chairman is the Honorable Edward T. Fairchild, Justice of the Supreme Court of Wisconsin. The results of the balloting will be announced, but it will not be disclosed or known how any member voted.

In order that there may be a full expression of public opinion by all citizens for the information of the Congress, with respect to each of the pending proposals as to the Courts, each member of the Association, along with other citizens, is urged by the Board of Governors to communicate his views, for or against each proposal, to the United States Senators and the Members of Congress from his State. *It is recommended also that local meetings of citizens, as well as local and State Bar Associations, will do well to discuss publicly the reasons for and against each proposal,* so that the same may be understood by the people, and a fully representative expression of public opinion obtained thereon.

A majority of the votes cast upon the referendum will decide and control the attitude and action of your Association upon each proposal. Your cooperation in obtaining a full vote is asked.

Very truly yours,

F. H. STINCHFIELD,
President.

GEORGE M. MORRIS,
Chairman of the House of Delegates.

HARRY S. KNIGHT,
Secretary.

The Official ballot begins with the statement that "As a member of the Association you are asked to detach and mark the following ballot so as to express your opinion upon *each* of the questions submitted, and to mail each ballot *immediately* in the enclosed envelope. No ballot received after March 10, 1937, can be counted." It continues:

Question One: Should the Congress enact the bill recommended by The President of the United States on February 5, 1937, which would empower the President, when any judge of the United States, appointed to hold his office during good behavior, has heretofore or hereafter attained the age of seventy years after at least ten years of service, and within six months thereafter has neither resigned nor retired, to nominate, and with the consent of the Senate to appoint, one additional judge for such Court, provided that this increase in the number of judges so appointed shall not result in more than fifteen members of the Supreme Court of the United States, or more than two additional judges for a Circuit Court of Appeals or other specified Court, and

otherwise as fully set out in the bill, the text of which is herewith printed?

a. With respect to the Supreme Court of the United States.

Yes *No*

☐ *Vote with an X Mark* ☐

b. With respect to the United States Circuit Courts of Appeals, District Courts and other Federal Courts.

Yes *No*

☐ *Vote with an X Mark* ☐

Question Two: Should the Congress enact the bill, also recommended by the President of the United States, empowering the Chief Justice of the Supreme Court to assign Circuit Judges and District Judges to duties outside their Circuit or District, as provided in the bill, the text of which is herewith printed?

Yes *No*

☐ *Vote with an X Mark* ☐

Question Three: Should the Congress authorize the Supreme Court of the United States to appoint an administrative assistant who may be known as the proctor, who shall be charged with the duty of watching and reporting as to the calendars and business of all Courts of the United States, with the further duties provided in the bill, the text of which is herewith printed?

Yes *No*

☐ *Vote with an X Mark* ☐

Question Four: Should the Congress enact a bill, also recommended by the President of the United States, requiring the Court to give notice to the Attorney-General of the pendency of any action in which the constitutionality of any statute of the United States is drawn in question on substantial grounds, and giving to the Attorney-General the right to appear, be heard, present testimony, and take part in such suit, with the rights of a party?

Yes *No*

☐ *Vote with an X Mark* ☐

Question Five: Should the Congress enact a bill, also recommended by the President of the United States, authorizing the Attorney-General, in his discretion, to appeal directly and immediately to the Supreme Court of the United States in any suit or proceeding in which any decision of a Court of the United States is against the constitutionality of a statute of the United States, and giving to appeals so taken precedence over other cases in the Supreme Court?

Yes *No*

☐ *Vote with an X Mark* ☐

Question Six: Should the Congress enact substantially the Sumners Bill (H. R. 2518; 75th Congress, 1st Session), granting to Justices of the Supreme Court the same rights and privileges with regard to retiring, instead of resigning, as are granted to judges other than Justices of the Supreme Court by Section 260 of the Judicial Code (U. S. C., Title 28, Sec. 275), and authorizing the President to appoint a successor to any such Justice of the Supreme Court upon his retiring from regular active service on the bench, etc.?

Yes *No*

☐ *Vote with an X Mark* ☐

EDWARD T. FAIRCHILD,
Chairman of the Board of Elections,
1140 North Dearborn Street,
Chicago, Illinois.

Junior Bar Conference Conducts Campaign of Public Discussion on Supreme Court Proposal—Object Is to Inform Public of Issues Raised—Other Conference News

CHALLENGED to quick, effective and organized public service on a specific issue, the Junior Bar Conference has swung into action to stimulate discussion of the arguments for and against President Roosevelt's proposal to enlarge the Supreme Court, to inform the public on the issues raised by that proposal, and to persuade citizens to register their views with the Congress.

This program is being conducted pending announcement of the results of the referendum of American Bar Association members now being taken, in which votes of Conference members are being counted separately. The program has been approved by the Board of Governors. The Activities Committee of the Conference, headed by Grant B. Cooper, Los Angeles, is directing the public information and public discussion campaign. This committee is operating through State, local and district Chairmen.

All Conference members have been asked to participate, and to communicate their willingness to participate to their State Chairmen at the earliest moment. House of Delegates members have been requested by the Board of Governors to cooperate in the program with Conference members. The State Chairmen have been directed by the Conference Council to work closely with House members in their states.

The Executive Council of the Conference inaugurated the program because it believed that the President's proposal raised issues of vital concern to each citizen. Before any vote on the proposal should be taken in Congress, the Council believes, each citizen should be fully informed of the benefits and dangers involved, and each Congressman should have the benefit of the matured and informed views of his constituents.

The Council has made it clear that until the referendum of Conference members has been taken and announced, no member or group of members of the Conference is entitled to represent himself or itself as speaking for the Conference. Members speaking for or against the proposal have been instructed to make it clear that they are voicing only their individual views.

In carrying out the program, Conference members are arranging open forum meetings, radio debates, speeches before civic organizations and clubs, and "town hall" discussions. The program planned in the District of Columbia typifies programs already under way in many states and communities. In the District, a special committee sent letters to each citizen's association and civic group, pointing out the importance of the Supreme Court proposal, and urging each group to devote at least one meeting to the subject.

The Committee has offered to supply organizations with two speakers, one for and one against the President's plan, to debate the subject in ten minute speeches. The Committee has also planned radio debates, and plans to close its activity with a public mass meeting, in which public discussion will be led by two prominent public figures, each representing one side of the subject.

Speaking Campaign to Aid Red Cross Drive

A public speaking program in aid of the Red Cross drive for funds for flood sufferers featured Conference activity during February. This campaign was suggested by, and conducted under the leadership of, the Activities Committee Chairman. The offer to assist the Red Cross prompted the following response from Douglas Griesemer, Director of the Funding Raising Activities: "The offer of the Junior Bar Conference expressed through you as Secretary to aid us in the present great flood emergency is most heartily appreciated by all of

our national officers." The entire Conference organization cooperated with notable success in the drive, and reports of many speeches in behalf of the Red Cross in theatres, over the radio, and before civic organizations have been received.

Junior Bar Conference members continued to figure in American Bar Association committee appointments made during the past few weeks. William A. Roberts, who served brilliantly as Conference Secretary until last August, is serving on the important seven man Committee of the House of Delegates and Board of Governors, to consider an economic study of the Bar. Guy Tobler, Conference membership committee chairman, was appointed to the special committee "to report to the Board of Governors at its next meeting a definitive plan for increasing the membership of the Association." Conference members appear on each of the committees of the Section of Bar Organization Activities, headed by Morris B. Mitchell.

Other Activities Reported

Reports from State Chairmen received during February indicate extensive Conference activity in all parts of the country. Space permits mention at this time of only a fraction of the work under way. In Utah, Pratt Kesler and his co-workers are concentrating upon the passage of a bill for the appointment and compensation of attorneys to defend indigent criminals. Stanley Ford's active New Jersey organization is conducting a vigorous speaking campaign on legal subjects of public interest, is holding legal forums wherein outstanding speakers are giving lectures on practical legal topics, and is cooperating with the Judicial Council of New Jersey in its work to improve the administration of justice.

Delaware members, led by C. Edward Duffy, have formulated a series of progressive amendments to the Delaware laws, which they are recommending to the Legislature. In Alabama, Peyton Bibb is working for the creation of a Junior Section of the Alabama State Bar Association.

An invitation to affiliate with the Junior Bar Conference has recently been extended to the newest Junior Bar Section of a State Bar—the Mississippi State Bar Junior Section. This section is headed by Hugh N. Clayton of New Albany. J. H. Graham of Meridian is vice chairman, and there is an executive committee of nine members. The section comprises all members of the State Bar under thirty-six years of age.

The prospect for a lively discussion at Kansas City of the suggestion to change the name of the Conference to "Section of Younger Lawyers of the American Bar Association" has been increased by a petition for the change made to the Council by the Little Rock, Arkansas, Junior Bar Association. The petition does not indicate whether the Little Rock group plans to change its own name if the petition is granted.

PAUL F. HANNAH,
Secretary of Junior Bar Conference.

Kansas City Bar Association's 1937 Radio Series

ENCOURAGED by its highly successful series of radio addresses in the past, the Kansas City Bar Association is putting on another one for 1937. The addresses are given over station WDAF, the Kansas City Star's radio station, from 6:45 to 7 p. m. The series began on February 6 and the program calls for several addresses each month until June 19, when the series ends. Following is the list of speakers, their subjects, and the dates on which they have already spoken or are scheduled to speak:

February 6—Harold E. Neibling, President of the Kansas City Bar Association, "The Bench, Bar and Public;" Feb. 13—Frank P. Barker, "The National Security Act"; Feb. 20—Wallace Sutherland, "The Lawyer's Responsibility;" Feb. 27—James E. Burke, "Rights of Employer and Employee in Labor Disputes;" March 6—Thomas A. Costalow, Asst. U. S. Attorney, "Criminal Cases;" March 13—Judge Elmer N. Powell, "A Better Understanding;" March 20—John T. Barker, Former Attorney General of Missouri, "Momentous Moments for the Supreme Court of the United States;" March 27—John S. Dawson, Chief Justice of the Kansas Supreme Court, "Great Men and Decisions of the Kansas Supreme Court."

April 3—Frank Brockus, "Count Your Blessings;" April 10—Ben W. Swofford, "Democracies;" April 17—Elliott Norquist, "We, The People;" April 24—R. T. Brewster, "Our Melting Pot;" May 1—Paul S. Conwell, "Personal Liberties;" May 8—George Kingsley, "Modern Municipalities;" May 15—Judge Darius A. Brown, "American Citizenship Credentials;" May 22—William C. Lucas, Vice President Kansas City Bar Association, "Chief Justices of the United States;" May 29—Inghram D. Hook, "Builders of America;" June 5—William Paul Pinkerton, "Lawyers of Different Nations;" June 12—Fred S. Hudson, "Presidents of the United States;" June 19—Clif Langsdale, "The American Bar."

Indiana Judicial Council in First Report Presents Bill for Non-Partisan Election of Judges—Results of Referendum of State Bar—Federal Trial Procedure Conditionally Favored

ENACTMENT of a law providing for the non-partisan election of judges is the main recommendation of the Judicial Council of Indiana, which has recently submitted its First Annual Report to the Governor and the Supreme Court of Indiana. A draft of the proposed statute, modeled largely upon those obtaining in various other states, is attached to the report.

Results of Bar Referendum

The Council's proposal was made after a referendum at which the lawyers of the State expressed their opinion on this and various other questions submitter to them. The Bar voted against a constitutional amendment providing for the appointment of Superior and Circuit Court Judges for a long term by the Governor on nomination of a non-partisan body (520 for, 826 against), but favored the non-partisan election plan by a vote of 981 to 369.

The referendum also disclosed that the Bar favored a constitutional amendment providing for a simplified procedure for removal of judicial officers for cause—855 to 496; favored the abolition of terms of court—937 to 415; favored a single system of trial courts, with an executive head, under which trial judges would be available for duty in other courts—745 to 579; favored abolition of the Appellate Court and increase of the membership of the Supreme Court to 9 or 11—856 to 486.

Adoption of Federal Trial Rules Conditionally Approved

The Indiana lawyers also approved the proposition that "if the new Federal trial procedure is not a serious departure from our present State System," it should be adopted in Indiana, so that the Federal and State Courts would use the same rules and thus promote uniformity throughout the country—1116 to 229. But they voted (553 to 732) against such adoption if the new Federal rules were a serious departure from the present State system. They also fa-

vored adoption of the Federal appellate procedure, if the Federal trial procedure should be adopted—896 to 334.

The Bar expressed the opinion that the Supreme Court should have the exclusive rule-making authority for civil, criminal and appellate procedure. Increase of ordinary court costs by one-third or one-half was disapproved—238 to 1103; a jury fee of $15 to $20 was voted down—481 to 858; compulsory advance payment of court costs was disapproved—572 to 779. Under the head of "Criminal Law" the Bar voted for a provision for alternate jurors—923 to 338; against depriving the jury of power to fix the length of imprisonment or the amount of fine—591 to 697; in favor of giving sheriffs authority to arrest in any county of the State—920 to 376; against authorizing prosecutor to comment on the failure of defendant to testify—638 to 668; in favor of long term imprisonment of persons repeatedly convicted of misdemeanors—931 to 348; in favor of giving the prosecution the same right to effective appeal as the defendant—687 to 349.

Tabulation on Certain Special Bases

Speaking of the referendum the report states that "the results were tabulated not only as to the general expression of opinion as indicated by the 'Yes' and 'No' answers, but also on the basis of the location of the attorney, his ability (according to the Martindale ratings), his wealth (according to the Martindale ratings), his present or past official position (if any), and his age. These latter tabulations developed little data of any apparent significance. Thus there was a tendency on the part of younger lawyers to favor proposed changes, a tendency among lawyers with 'very high' Martindale ratings to favor the non-partisan election of judges, and a tendency on the part of lawyers in the larger centers of population to favor an integration of the trial courts into one system, and a tendency on the part of the lawyers in the smaller centers of population to oppose any re-definition of judicial circuits. In practically all other respects the voting was quite uniform throughout those various groups.

Under the head of "Procedure and Court Reorganization" the report said:

"The Judicial Council is making no affirmative recommendations in the fields of procedure and court reorganization at this time. It believes that the proposed new Federal Rules should form the basis for any significant changes in the field of procedure. It is settled that those rules will not be promulgated by the United States Supreme Court for at least another year so that it seems wise to postpone any action in this field until that time. It is the opinion of the Council that a recommendation in this field should include a complete redrafting of the Code of Civil, Criminal, and Appellate Procedure in order to avoid the confusion incident to any attempted amendment of the present law.

"It expects to prepare and present two years from now such a code and to include in such a code a provision giving the Supreme Court the exclusive rule-making authority for Civil, Criminal, and Appellate Procedure. It seems inadvisable to recommend this latter proposition at this time, as confusion would result from the promulgation of any rules by the court which by implication woud repeal or amend existing statutes. It seems more desirable to draft a complete code and permit its specific amendment by court rule later. For the same reason it has seemed inadvisable to make any recommendations in the field of the reorganization of the courts."

The report is signed by Herdis F. Clements, Harvey Curtis, Paul Y. Davis, George O. Dix, Martin J. Downey, Sumner Kenner, Jesse E. Wade, Bernard C. Gavit, Secretary, and Curtis W. Roll, Chairman.

National Lawyers Guild Holds First Convention

THE first national convention of the National Lawyers Guild was held in Washington, D. C. for three days, ending February 22. According to form letters sent out two weeks earlier, the Guild "was organized December 1, 1936, in response to the widespread demand of countless lawyers throughout the country for a truly representative and progressive national bar association."

The object of the guild, as stated in the preamble of its constitution, is to unite "the lawyers of America in a professional organization which shall function as an effective social force in the service of the people to the end that human rights shall be regarded as more sacred than property rights."

It would "bring together all lawyers who regard adjustments to new conditions as more important than the veneration of precedents, who recognize the importance of safeguarding and extending the rights of the workers and farmers upon which the welfare of the entire nation depends."

It was explained, in the letter above referred to, to be prevailing sentiment that the "organization should proceed, initially, solely on the basis of national membership." The reason was that "it would be unwise to duplicate existing local organizations." But, it was added, "of course, in places where local bar associations are moribund, or hopelessly reactionary, local groups of affiliated chapters could be established."

The Guild elected Judge John P. Devaney, formerly Chief Justice of the Supreme Court of Minnesota, as President for six weeks, while a national poll is being taken. Four regional vice presidents were chosen, as follows: George K. Bowden, of Illinois; George T. Davis, of California; Thomas C. Eagan, of Pennsylvania, and Paul Kern, of New York. Mr. Mortimer Riemer, of New York, was elected Secretary and Miss Pearl Hart, of Chicago, treasurer.

Frank P. Walsh was elected chairman of the Executive Committee. Following are the other members: Representative Maury Maverick of Texas, former Senator Smith W. Brookhart of Iowa, Governor Elmer Benson of Minnesota, Governor Philip La Follette of Wisconsin, Osmond Frankel of New York, George T. Davis of California, Dr. Maurice Sugar of Michigan, and Felix Cohn of Washington;

Also, Abraham Fortas of the Yale Law School faculty; Jerome Frank of New York, Professor Alexander Hamilton Frey, University of Pennsylvania Law School; Professor Albert McGruder, Harvard Law School; Carlton Ogburn of Washington, counsel for the American Federation of Labor; Professor Malcolm P. Sharp, University of Chicago.

Hearty endorsement by the Guild of the President's proposal for reorganization of the Supreme Court "as the only immediately available method to make possible progressive legislation now imperatively needed" seemed to be based on the expressed belief "that the majority of the Supreme Court has fallen behind the needs of the times, has blocked progress and is now out of harmony with the urgent social and economic demands of the people."

A resolution was adopted for a referendum to the Guild's members of two proposed constitutional amendments: (a) to take from the Supreme Court (and lesser Federal courts) the power to declare invalid any act of Congress on the ground that it is in conflict with the Constitution, and likewise to prevent the State courts from invalidating legislative acts on that ground; and (b) to change the method of amending the Constitution. The plan would be for Congress to initiate the amendment and then for the people to vote on it directly. Only a majority vote would be needed to ratify, instead of three-fourths of the States, as at present.

Other action taken included: indorsement of the child labor amendment; rotation of lawyers in appointing receivers; extension of legal aid societies

staffed with attorneys in the civil service; repeal of all legislation restricting freedom of speech and opinion, including teachers' oaths and laws making it a criminal offense to advocate the doctrine of or membership in any political party; and an amendment to the immigration laws to provide for restoration of the traditional policy of asylum for political refugees.

Advisory Committee Meets to Consider Suggestions

THE Advisory Committee appointed by the Supreme Court to aid in the preparation of Rules of Civil Procedure in the District Courts of the United States, met in Washington, February 1st, and continued its sessions during the next four days. Before final adjournment the Committee finished the consideration of every suggestion submitted by the various committees and by individual members of the bench and bar. The volume of suggestions and the extent of professional cooperation were extraordinary and have resulted in some changes of substance and many of form in nearly every rule. Diligent efforts are now being made to submit the revised draft to the court at the earliest possible date.

"The Southern Lawyer," New Legal Magazine, Gets Out First Issue

THE first issue of the Southern Lawyer, a quarterly magazine published by lawyers for the benefit of the legal profession, made its appearance in January. The magazine is published at Milledgeville, Ga., by a corporation organized by lawyers of several Southern States on a non-profit basis. The first issue is dedicated to Chief Justice Richard B. Russell of the Georgia Supreme Court and to Judge James B. Park, Judge of the Okmulgee Circuit Superior Court. It is in the nature of a law review or journal, carries technical articles of interest to the legal profession, news of the various Bar Association activities of the Southern States, recent decisions, book reviews and the like. The first issue contains articles by Judge Park, Chief Justice Russell, Judge Walter H. Robertson of Abingdon, Va., Howard Gordon of the Danielsville, Georgia, Bar, Randall Evans, Jr., of the Thomson, Georgia, Bar, Leo T. Crowley, Chairman of the Federal Deposit Insurance Corporation of Washington, D. C., the new Superior Court rules for Georgia and other news and comment. C. B. McCullar, a member of the firm of McCullar & McCullar of Milledgeville, is the Editor.

Missouri Supreme Court Enjoins Laymen from Illegal Practice Before Public Service Commission—Inherent Power Discussed—Proceeding Instituted by Bar Committees Appointed by Supreme Court

IN a sweeping decision in which three different views were set forth as to the power of the legislature and the inherent power of the court to regulate the practice of law, the Missouri Supreme Court unanimously condemned the illegal practice of law by laymen appearing before the Public Service Commission and found three defendants so engaged, guilty of contempt of court in the cases of Boyle G. Clark, General Chairman of the Bar Committees of the State Bar of Missouri, et al., vs. Edwin S. Austin (Case No. 34, 481), P. H. Coon (Case No. 34, 482) and J. Fred Hull (Case No. 34, 483).

This is the first important unauthorized practice case instituted by the Bar Committees appointed by the Supreme Court, to be decided by that tribunal, and the decision sustained the contention of informants.

According to Attorney General Roy McKittrick of that state, investigation last year revealed more than a hundred cases where laymen were acting as attorneys before the Commission, participating in the trial and hearing of applications for certificates of convenience and necessity, interviewing witnesses, passing on the value and admissibility of evidence, examining witnesses and objecting to the introduction of testimony. To end these practices, contempt charges were filed directly in the Supreme Court of Missouri, and the decision in these cases, disposed of in one opinion handed down the middle of February, strongly condemns these practices as unlawful.

The respondents in these cases were all charged with illegal practice before the Public Service Commission. It was admitted that none of them were licensed to practice law, and that they prepared and filed pleadings, appeared in hearings, gave advice as to what facts should be established and examined witnesses.

"Respondent Coon," the court said, "alleges that he was a regular employee of the Missouri Pacific Railroad Company in the capacity of Assistant General Freight Agent; that in the hearings before the Public Service Commission, he represented said railroad in the capacity of employee and freight agent, and not in the capacity of an attorney at law. The capacity in which he appeared in such hearings must be determined by the admitted acts he performed, and not by his alleged statement of the capacity in which he appeared. The law recognizes the right of natural persons to act for themselves in their own affairs, although the acts performed by them, if performed for others, would constitute the practice of law. A natural person may present his own case in court or elsewhere, although he is not a licensed lawyer. A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot appear or act in person. It must act in all its affairs through agents or representatives. In legal matters, it must act, if at all, through licensed attorneys. (Citing Cases) . . .

"Respondent, Coon, not being a licensed lawyer, his employment by the Missouri Pacific Railroad Company in the capacity of freight agent, did not authorize him to represent the railroad in matters involving the practice of law."

In reference to what constitutes practice of law, the court said:

"The practice of law is not confined to appearance in court in a representative capacity as an advocate. A person may never appear in court and yet be engaged in the practice of law. One engaged in the practice of law in this state without a license authorizing him so to do, is in contempt of this court regardless of whether he appears as an attorney in this court or in any other court of record. (Citing cases). The theory of above holding is that the practice of law outside of court proceedings, is a contempt of this court and punishable as such 'because the wrongdoer has affronted this court by usurping a privilege solely within the power of this court to grant.'"

Inherent Power Discussed

The question of the inherent power of the court came up with reference to a contention of one defendant that a Missouri statute, since it empowered the court to license persons to practice law in courts of record, thereby excluded its power to require persons to be licensed to practice except in courts of record. Judge Frank, in dealing with this argument in the principal opinion, declared that the statute was not binding on the court as beyond the power of the legislature. "If this court has inherent power to define and regulate the practice of law," he said, "acts coming within the court's definition would constitute the practice of law regardless of the place of their performance. The

(*Continued on page 224*)

THE CENTENNIAL OF LINCOLN'S ADMISSION TO THE BAR—AN HISTORIC EVENT

To Comprehend the Lincoln Who Met Every Crisis in His Remarkable Career with Unfailing Wisdom, One Must Know That He Spent Twenty-Three of His Fifty Years of Life in Law Offices, in Courts and on the Judicial Circuits—It Was the Law That Developed and Enlarged Those Forces of Intellect and Character He Was Later to Display in the Hour of the Nation's Greatest Peril—What He Learned as a Lawyer He Applied as a Statesman

By Albert A. Woldman
Author of "Lawyer Lincoln"

MARCH 1 marks the centennial of a significant and far-reaching event in American history. It was March 1, 1837, when Abraham Lincoln was admitted to the practice of law in Illinois—an event which was to mould his life and vitally affect the history of our Nation.

It was a barrel of junk—contents unknown—purchased by Abraham Lincoln for fifty cents which shaped his career and changed the course of history.

Shaped his career—for weeks later when this barrel was emptied, it disgorged on the floor of Lincoln's store a badly worn edition of Blackstone's Commentaries. So assiduously did he study it that within a comparatively short time he had mastered the elementary principles of law explained therein, and so impressed became his naturally analytical mind with the logic and reasoning of the great English jurist, that from the chance finding of this book of law arose one of the most momentous decisions in all of Lincoln's epoch making career—the resolve to make law his life's calling.

Changed the course of history—for it is highly improbable that this otherwise unlearned and intellectually undeveloped product of the Illinois prairies could ever have become available for the presidency of the United States without the twenty-three years of training he eventually received at the bar.

Well may we wonder what difference it would have made in the course of history if, instead of entering the law profession, Lincoln had taken to some other line of endeavor. After toiling as a farm laborer, hostler, boatman, and store clerk, and serving in the Black Hawk War, he thought seriously of becoming a blacksmith. He changed his mind, however, when the opportunity came to purchase a country store on credit. Failing in this enterprise, he later became a land surveyor. What if he had decided to remain permanently in any one of these trades? What would have happened if he had entered the pulpit, medicine, journalism or some other learned profession instead of the law? Would the course of history have run the same? Or would he have lived his days in almost unrecognizable obscurity and then have gone down to his grave "unwept, unhonored and unsung?" Well may we wonder! For one cannot study the life of Lincoln without observing that nearly every important and outstanding event in his public career was in one manner or another influenced by his training and experience as a lawyer.

Born in wretched poverty, unprivileged and unknown, reared amid surroundings such as ordinarily stunt the growth of intellectual power and crush out every aspiration to mental achievement, he was ready when late in life he was entrusted with the destiny of a nation in a crisis affecting the fate of human freedom.

Uneducated, unlearned, with only one year of actual schooling in all his life, men of deep learning and statesmen of vast experience learned to listen to his counsel and willingly to follow his leadership.

Untrained in the art of oratory, he became one of the most gifted pleaders of all ages.

A simple, unassuming self-styled "mastfed" lawyer, he became the great interpreter of the American Constitution.

Unskilled in statecraft, he was able to outmaster the most experienced of diplomats and craftiest of statesmen.

Without a worldly advantage, he became the chosen leader of his nation, the liberator of the slave, the deliverer of his country, and in one short turn of the kaleidoscope is canonized by all mankind.

What in Lincoln's life prepared him for his high destiny? He was twenty-one when he moved to Illinois. His formal schooling secured at odd times was less than a year all told. He had grown to young manhood amid the primitive wilds of Indiana. All his boyhood had been spent in manual labor in field and forest. In the all-pervading woods he helped make clearings for fields and cabins; he split rails to fence the tilled lands, ploughed, dug ditches, chopped wood, drove ox teams and participated fully in the toil and privations so common to that early period.

Up to early manhood the scope of his reading consisted of the Bible, Aesop's Fables, Robinson Crusoe, Pilgrim's Progress, a history of the United States, Weem's Life of Washington, and probably a few other books he had been able to borrow. He was without friends to help him; he was without money; he had no trade or profession; his scholastic attainments were most limited.

A trip to New Orleans as a boathand, a clerk in a store, captain in the Black Hawk Indian War, postmaster and assistant surveyor were the occupations he followed prior to his admission to the bar. Surely none of these was to train him for his mighty responsibility of a quarter of a century later. Nor were four uneventful terms in the legislature of Illinois and two unfruitful years spent in the House of representatives

From a rare untouched photograph in the collection of William H. Townsend, of Lexington, Kentucky

of the United States Congress to contribute much to his future greatness.

Whence, then, came his preparation? Where did he attain the power and wisdom that enabled him to rise to supreme command in the supreme moment? By the rub of what Aladdin's Lamp was he enabled to step from the lawyer's office of a country town of Illinois to the helm of the ship of state in the most perilous days of a nation's history? Men marvel at his miraculous rise because they cannot trace the steps by which he climbed.

And yet he was no heavenborn genius. He did not suddenly rise from vulgar ignorance into supreme comprehension. That Lincoln was endowed with a great intellect is beyond question. But there is nothing mysterious about his extraordinary development.

Lincoln was trained and educated for twenty-three long, arduous years, with the law as his chief schoolmaster.

The law stirred his youthful imagination and vitalized and focused his ambition, concentrated his meandering and undisciplined energies into one living, powerful force. It gathered his undeveloped and unmethodical habits and molded and shaped them for high achievement.

The law developed and enlarged those forces of intellect and character he later was to display in the great crisis as no other pursuit could have done. For as Edmund Burke declared in one of his great speeches commenting on the power of the Colonial lawyers at the time of the Revolution: "This study of law renders men acute, inquisitive, dextrous, prompt in attack, ready in defense, full of resources. No other profession is more closely connected with actual life than the law. It concerns the highest of all temporal interests of man — property, reputation, the peace of all families, the arbitrations and peace of nations, liberty, life even, and the very foundations of society."

That profession taught Lincoln far more than merely the technical knowledge of rules of practice, of demurrers, of pleas in abatement and pleas in bar. It proved for him a study of human institutions and of history itself. For as the laws of a country mark its history and its progress, its statutes and judicial reports were for Lincoln "overflowing fountains of knowledge respecting the progress of Anglo-Saxon society from feudalism down to the splendor of the commercial age." Here were the facts necessary to understand men—as they have been and as they are—men and the processes through which they have passed in their progress towards a higher development. Here was the history of humanity and its business activities, the use and growth of government, its purposes and results. Here was a vast depository of knowledge of the arts and sciences and their reflex influences upon human relations.

For nearly a quarter of a century, Lincoln's daily association and combats with the giants of the early Illinois bar—a coterie of brilliant lawyers seldom excelled as a group—broadened his faculties for the practical game of life. In the daily matching of wits with these able barristers the bookless man found the technical schooling he lacked as a youth; and in the fierce antagonisms of forensic contests on questions varied as life and as broad as the government itself he

fought for the rights of men and helped lay the foundation of the jurisprudence of a great commonwealth!

Lawyer Lincoln participated in thousands of cases in the justice of the peace, circuit and federal district courts. He tried alone or in association with other attorneys, one hundred and seventy-eight cases in the Supreme Court of Illinois. This is a record probably never equalled in his State. He also appeared in three cases in the Supreme Court of the United States. Competing with the legal giants of the Mid-West, his standing among them was always of a high order. In certain respects he led them all.

Lincoln's high standing as a lawyer is best revealed by the fact that in hundreds of important cases, other members of the bar—competitors, if you please—retained him, of all the thousand or more attorneys then practicing in Illinois, to become associated with them in trials in the lower courts or arguments of appeals in the Supreme Court. In fact, on the circuit about two-thirds of Lincoln's retainers were from associate counsel. What higher recognition can there be of the true worth of Lincoln the lawyer?

The study of law made the otherwise unschooled product of the prairies a student of government and constantly brought him into direct contact with its working features! It taught him to promulgate laws and to enforce them; taught him the principles of international law; taught him the common law, its history and purposes and familiarized him with the struggle for Anglo-Saxon liberty, the formulating of the Magna Charta, trial by jury, writ of habeas corpus, the petition of right, the bill of rights and the establishment of that system of jurisprudence that has ever been a bulwark of defense against oppression and injustice! His study of the common law with its repeated blows leveled at the feudal system subconsciously laid in the brain of the future Great Emancipator the foundation of the principles of civil and religious liberty!

Building at Southeast corner of Public Square at Springfield, Ill., in which the firm of Logan and Lincoln had its office. Reprinted from February, 1933 issue of Journal.

His profession may or may not have taught him the arts and sciences but of a certainty it did teach him to know men—to know their thoughts and minds and souls. It gave him an insight into their characters and the motives which animate men. It taught him of their strength and weakness, their successes and failures, their sorrows and trials, their lowest and highest aspirations, their dreams and realities, their family and social relations and oftentimes their struggles for life itself. His courtroom experience taught him to deal intelligently with his fellowmen. In the same manner that he learned skillfully and carefully to select the jurors to try his causes, it taught him later to select his cabinet ministers and generals. For in the rough and tumble of court room trials he came to know the honest and dishonest, the sincere and the bluffer, the trickster and the opportunist, the highminded and the cad. Years before he became President he had come in contact with and had learned to handle the Sewards and Chases and Stantons and McClellans and Grants of the masses.

It was his traveling up and down and all around the judicial circuits of Illinois that spread his acquaintanceship and made him a favorite with the voters of that State and enabled him to meet every kind of man and every rank of society.

Because the law regulates man's conduct toward his fellowmen and controls his gross passions and restrains his rude impulses, it has ever been the responsibility of the lawyer to counsel and guide aright the restless masses and to define their policies and laws from those dealing with the highest international treaties to the pettiest form of actions in the lowest court. And so the law taught Lincoln to give sane and cautious counsel and advice to guide the public from ways of danger to safety. Trained first to counsel his litigious neighbors individually, he was able later to guide them when collectively they were undergoing their greatest trial.

As a lawyer he learned that justice is the greatest interest of men on earth; that people nearly always prefer compromise to contests and that in every heated controversy among men the truth lies somewhere between the two extremes; that in bitter combats the nominal winner is often the real loser in the end. It fixed in his mind the high conception that right makes might.

It was Lincoln the lawyer's adroit cross-examination that entrapped Douglas in their famous debates which lost him the Illinois senatorship but won him national renown.

The very men who presented Lincoln to the Chicago Republican Convention as the man of the hour and most available candidate, and procured his nomination, were the lawyers of his old circuit who first learned to know and admire and love Lincoln for his rare ability, his analytic mind and unique intellect, conspicuous common sense, rare felicity in statement and fine legal conscience.

Lincoln came upon the scene when the burning, all-consuming issue of the day was the conflict between slavery and freedom. It was an issue replete with questions of constitutional law. Slavery was fixed in the law of the land and confessed in the Constitution.

Like all other forms of special privilege, slavery lay snugly entrenched behind an entanglement of constitutional limitations, legal precedents and statutory technicalities. Who better than an able lawyer could cope with its manifold problems?

The Supreme Court of the United States by its fateful pronouncement in the Dred Scott case compressed the whole question into a problem of legal and constitutional interpretations. Epitomized, the issue became: Is the Dred Scott decision good law?

To Lincoln, the lawyer, the most vital issue of all—the assumed right of State secession—was largely a legal and constitutional problem. Briefly the question was: Can a State lawfully withdraw from the Union?

Lincoln, the constitutional lawyer, was ready with the answer. The individual States had by agreement formed a Union, he declared. Restating the well settled principle of law, he denied the Southern States the right to secede on the ground that one party to a contract could not abrogate it; that a contract might be broken, but that it could not be rescinded except for fraud in its inception or with the concurrent act of both parties.

In rapid succession came a formidable series of unprecedented legal and constitutional problems requiring interpretation and immediate decision and action.

In the career of no other President was the legal phase as prominent and important as in the life of Lincoln. No other chief magistrate of this Nation has ever been confronted with more grave legal and constitutional problems demanding summary solution. None experienced greater need of a comprehensive legal training and understanding of the broad principles of law and justice combined with a reasoning power to find the legal way out of the maze of constitutional entanglements and technicalities that threatened to thwart every effort of Lincoln during the terrible crisis.

Lincoln's first portrait, aged 37. Taken when he began riding the circuit. Reprinted from February 1926, issue of Journal.

The emergency which confronted Lincoln demanded a leader possessed of a legal conscience—a man imbued with the supremacy of the law as embodied in the Constitution; who by wise and sane interpretation could give to the Constitution an elasticity and adaptability necessary to cope with the unparalleled situation and yet act at all times within its provisions.

Abraham Lincoln, without special training for high executive office, was qualified to assume his stupendous obligations because the problems which confronted him as President, in a general sense, were not unlike those he had tackled for nearly a quarter of a century as a lawyer—only on a scale far more vast.

It was Lincoln the lawyer who was able intelligently to take issue with the Supreme Court over the Dred Scott decision and point out to an outraged people the fallacies lurking therein.

It was Lincoln the lawyer and master jury pleader that gave us the imperishable Inaugural and Gettysburg addresses.

It was Lincoln the lawyer who understood the inviolability of property rights and urged emancipation by compensation.

It was Lincoln the careful author of thousands of courtroom pleadings who could rewrite the diplomatic papers of his Secretary of State and by substituting a few well-chosen words and phrases for those of Seward, avoid a dangerous diplomatic crisis.

It was Lincoln the lawyer who had learned there are two sides to every controversy of merit and who studied the other fellow's case as well as his own, who avoided war with England when he reviewed the facts of the Mason and Slidell controversy and concluded that the United States was wrong in the historic Trent affair.

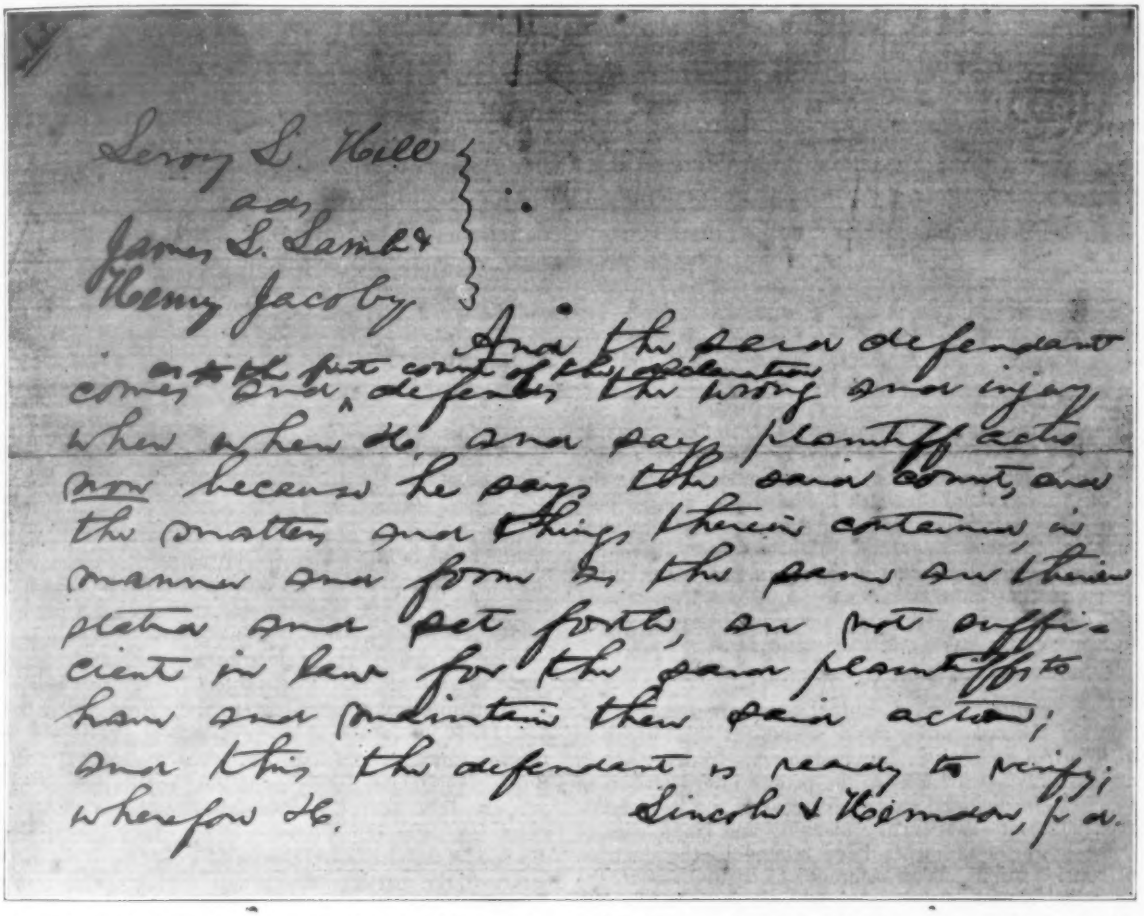
It was Lincoln the lawyer who when the exigency arose was able to match wits with the venerable and scholarly Roger B. Taney, Chief Justice of the United States Supreme Court, over the constitutional question of the President's right to suspend the privilege of the writ of habeas corpus, and by the acumen of his arguments was able to win popular approval of his contentions.

It was Lincoln's twenty-three years of training at the bar that enabled him as President to cope with the numberless unprecedented legal and constitutional problems that confronted him at every turn throughout his turbulent administration.

And it was Lincoln the lawyer unaided and alone who wrote that immortal legal document—that second Declaration of Independence—the Emancipation Proclamation which forever ended slavery in America.

His court room strategy had made him a superb master of himself, and, therefore, a master of every crisis. Although called upon to solve governmental problems such as no other man in our history had to face, he never forgot that there was a legal and constitutional way of meeting them. His every expression and every act was marked by the impress of his training and experience at the bar. He was always a lawyer.

That Lincoln's interpretation of some of the con-


Leroy L. Hill
and
James L. Lamb &
Henry Jacoby

And the said defendant
comes & defends the wrong and injury
when & where &c. and says plaintiff ought
not because he says the said Court, and
the matters and things therein contained, in
manner and form as the said declaration
states and set forth, are not sufficient in law for the said plaintiff to
have and maintain their said action;
and this the defendant is ready to verify;
wherefore &c.

Lincoln & Herndon, p. d.

The above photograph of demurrer in Lincoln's own handwriting is taken from the original in the possession of Hon. J. Weston Allen of Boston, Mass. Reprinted from April, 1929 issue of Journal.

stitutional questions, hitherto unadjudicated, was at variance with the theories of others, was inevitable. As only an accomplished lawyer could, he tackled the unprecedented legal and constitutional problems that confronted him. He met them all with courage, logic and prudence. As a result, with hardly any exceptions, his judgments were eventually ratified by the courts.

Well might we agree with William Howard Taft, the only man in American history to serve the Nation as President and Chief Justice, when he stated that no man ever lived who would have made an abler Chief Justice of the United States Supreme Court than Abraham Lincoln.

No picture of Abraham Lincoln is complete without the detailed background created by the twenty-three years of experience at the bar. Nowhere are his individuality, characteristics, traits and idiosyncrasies more marked than in the law office and the courtroom. Nowhere are his humanity, reasoning, logic and eloquence more impressive. Even in petty and trivial cases, otherwise dull and uninteresting, can be found touches of his characteristic love of justice, honesty, humility and forbearance, courage and fighting qualities, humaneness, kindness, modesty and sympathy, tact and adroitness, wit, humor and power of satire. Here can be found all his human weaknesses as well as the elements of his greatness. Even in his law pleadings and briefs, technical and seemingly unimportant, are characteristic specimens of his method of reasoning and style of expression.

To understand the adroit stump speaker of the Douglas debates; the fearless critic intelligently taking issue with the Supreme Court of the United States over the Dred Scott decision; the logician calmly and dispassionately analyzing the constitutional status of slavery before a learned and cultured audience at Cooper institute, requires an analysis of his law career.

To comprehend Lincoln the defender of the Constitution successfully combating the legal sophism of the Southern leaders claiming secession to be a constitutional right of the individual States; to perceive the interpreter of the Constitution rising to a level with Marshall and Webster as he makes momentous and unprecedented decisions affecting the very life of that instrument and the government created by it; to understand Lincoln the preserver of the Union and author of the Emancipation Proclamation, one must know the Lincoln who spent twenty-three of his fifty-six years of life in law offices, in the courts and on the judicial circuits. In no other way can his seemingly inexplicable genius become comprehensible.

THE LAW OF CONTRACTS SINCE THE RESTATEMENT

A Few Striking Decisions That Have Taken Place since the Restatement Appeared and Moot Questions Suggested by Some of Its Rules That May Seem Novel—Mutual Assent—Consideration—Contracts under Seal—Third Party Beneficiaries—Assignments—Risk of Loss between Vendor and Purchaser—Anticipatory Breach

By Samuel Williston
Reporter for Restatement of Contracts, American Law Institute

In so large a branch of the law as that of contracts, it is impossible, within the limits of a magazine article, to attempt a resumé of recent decisions covering the whole subject; and the settled character of a large portion of its principles, makes the attempt less desirable than it otherwise might be. It seems best, therefore, to confine this discussion in the main to a few striking decisions that have taken place since the Restatement of Contracts appeared, or to moot questions suggested by some of its rules that may seem novel.

MUTUAL ASSENT

A manifestation of mutual assent and consideration are the recognized requirements for the formation of informal contracts. Innumerable battles have arisen and will always arise as to the proper interpretation of the facts in disputed cases, but most of the legal quarrels in recent years on the meaning and boundaries of these legal requirements have related to the doctrine of consideration. With reference to mutual assent, the so called objective theory, clearly set forth in the Restatement of Contracts,[1] has so definitely prevailed that judicial decisions based on the assumption that an actual identity of intent is necessary for the formation of a contract are rare. Courts do indeed still speak of a "meeting of minds" but the words no longer connote what they once did, that mental agreement, as distinguished from a manifestation of assent, is vital.

Mutual mistake of an essential fact may make a contract voidable, and according to some authorities mistake by one party may sometimes have this effect, but the question of voidability of a contract is not the same as that of its existence.[2] There are however still a few points of purely legal dogma in dispute regarding the requisite mutual assent. On one of these which had been the subject of much discussion the Restatement took an advanced position. Where an offer of a unilateral contract is made, it seems logically that there is neither the required manifestation of assent nor the desired consideration until the act requested has been performed, and that means entirely performed, since nothing was offered for part performance. Until all has been done it would seem that the offer was revocable. Courts have striven to avoid this unjust conclusion by a fictitious interpretation of the transaction as bilateral after part performance, or by other doubtful reasoning.[3] The Restatement of Contracts meets this, and the analogous problem of refusal by the offeror of a tender of the requested performance by the offeree, by the direct statement that either part performance or tender by the offeree prevents revocation by the offeror of a unilateral contract.[4] The logical justification of the statement is the same as that hereafter set forth under the heading of consideration, that detrimental action in justifiable reliance on a promise serves as the equivalent of consideration. There is no similar provision with reference to bilateral contracts, since the offeree there can protect himself immediately by a manifestation of assent to the offer.

How far silence can constitute acceptance of an offer is another problem that gives a chance for dispute. It is clear that silent taking or keeping offered property or other benefits with knowledge that payment for them is expected will constitute acceptance.[5] So it is that either by a general usage or by a usage between the parties in previous dealings silence may be effective as an acceptance;[6] but the Restatement of Contracts goes further in asserting that aside from such cases there is an acceptance "where the offeror has stated or given the offeree reason to understand that the assent may be manifested by silence or inaction and the offeree in remaining silent and inactive intends to accept the offer."[7] This is a case where subjective intent becomes important; silence in the case supposed is ambiguous, and since the offeror has given the offeree to understand that silence is a sufficient manifestation of assent, he cannot complain that his situation is difficult,[8] in that the offeree may disregard the offer, as he undoubtedly may, without becoming bound.[9] Though there is little authority as yet supporting the rule just quoted, another paragraph of the same section,[10] to the effect that where the offeree has given the offeror reason to understand that silence will indicate acceptance, has been given frequent recent application in a particular class of cases. Where one solicits and receives an offer, surrounding circumstances or the

1. §20, stating that with slight qualifying exceptions in §§55, 71, 72, "neither mental assent to the promises in the contract nor real or apparent intent that the promises shall be legally binding is essential."

2. In the exceptional case of ambiguity without fault of either party, the mental understanding by the parties of their words or acts may become important. Rest., Contracts, §71.

3. The cases are collected in Williston, Contracts (2 ed.), §60A.

4. §45. This section was applied in Ruess v. Baron, 69 Cal. App. 388, 10 P. (2d), reversed on other grounds, 217 Cal. 83, 17 P. (2d) 119. *See also* Hollidge v. Gusson, 67 F. (2d) 459 (C.C.A.1), where §45 was also cited.

5. Rest., Contracts, §72 (1 a), 2; Williston, Contracts (2 ed.), §§91, 91A.

6. Rest., Contracts, §72 (1 c); Williston, Contracts (2 ed.), §91C.

7. Rest., Contracts, §72 (1 b).

8. The writer's defense of this rule of the Restatement is quoted in Troyer v. Fox, 162 Wash. 537, 548, 298 P. 733, though the facts of the case did not make the rule applicable, since there was no proof that the silence of the offeree was with intent to accept.

9. Many decisions to this effect are cited in Williston, Contracts (2 ed.), §91C.

10. §72 (1 c).

relation of the parties may easily justify the offeror in assuming that the offeree's silence indicates assent.[11]

CONSIDERATION

The requirement of consideration for the formation of contracts has received severe attacks from more than one legal writer. Lord Wright in a recent article in the Harvard Law Review[12] argued that the statutory abolition of the doctrine would not involve serious readjustment. Dean Ashley went farther and suggested that a "strong judge" might accomplish this result without the aid of a statute.[13] Dean Pound, while not going so far, has indicated a strong dislike for the technicalities of the doctrine.[14]

It is impossible to deny that the application of the standard test of the sufficiency of consideration necessary to support a promise or a discharge from liability not infrequently produces results that are not only so technical, but are practically so undesirable that many courts resort to fallacious reasoning in order to avoid them. What then is the best path? If the abolition of the requirement of consideration means that all promises shall create a legal obligation, there is reason to fear that the remedy would prove too drastic. Without proving this by going through the dangers of trying such a noble experiment, it should be evident that the American people at least cannot maintain a standard that would involve the enforcement of every careless promise. It may be argued that if a rule permitting the enforcement of all promises is impolitic, only such promises as were made with intent to create a legal obligation, or such promises as had reasonable "cause" as understood in the French law, should be binding. These tests would doubtless be broader but also vaguer than the test furnished by consideration. A new series of litigated cases would be needed to mark out the boundaries of the new doctrine. Whether it would be desirable if our law were to be made over from its foundations upward, an overthrow of so basic a doctrine as that of consideration seems not only unlikely but undesirable. Improvement comes by growth and modification not by revolution. A less ambitious change would preserve our present rule for oral contracts, but give to written promises the effect that the common law gave to sealed instruments. Even this is troublesome from its vagueness. What is a "written contract?" Should a promise in an informal letter be enforced? May not the requirement of writing prove as technical as the requirement of a bargained for exchange for a promise. Also, such a rule would not afford help in oral transactions where injustice is quite as possible as in written ones. The proposed Written Obligations Act, hereafter referred to, which creates an enforceable formal contract when a signed written promise or discharge states that it was intended to be legally operative would be helpful but this obviously would not be enough to cover the whole ground of enforceable promises.

The present law of simple contracts is derived from the old law of debt combined with the doctrines which formed the original basis of the action of assumpsit. The fundamental requirement of debt was a *quid pro quo,* that is an exchange for the debtor's obligation. Assumpsit, on the other hand, in its origin was regarded as a tort in the nature of deceit, and the gist of it was reliance to the plaintiff's injury on the promise of the defendant. These two foundation stones of the modern law of informal contracts furnished the two alternatives for the common definition of sufficiency of consideration, namely, a benefit to the promisor or a detriment to the promisee.

In the development of the law, however, the idea of exchange soon became predominant, and bargain and exchange are the common features of informal contracts that come today to the minds of lawyers. Nevertheless, the old idea of reliance to the plaintiff's injury as a basis of recovery has not wholly died out. It is the inherent justice of giving relief in many such cases which has led, especially in the United States, to the allowance of recovery in certain groups of cases of this sort, although the courts frequently, perhaps generally, have sought, even by resorting to fiction, to find in them some exchange for the promise. Especially in the enforcement of charitable subscriptions recovery has been allowed when the promisee has incurred expense in reliance on the subscription.[15]

The Restatement of Contracts in §90 undertook to state a general rule based on these scattered groups of decisions. The rule is stated:

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise."

It seems probable that this Section will prove an acceptable general statement to the courts. It restates the doctrine of "promissory estoppel"[16] in formulated language with a qualification that affords the court ample leeway in dealing with particular cases.[17]

11. Laredo Nat. Bank v. Gordon, 61 F. (2d) 906 (C. C. A. 5) (client solicited attorney to name amount of his fee if case settled); Cole-McIntyre-Norfleet Co. v. Holloway, 141 Tenn. 679, 214 S. W. 817, 7 A. L. R. 1683 (salesman solicited order); Hendrickson v. International Harvester Co., 100 Vt. 161, 135 A. 702 (salesman solicited order). See further, Williston, Contracts (2 ed.), §91C, n. 5. *See also* Wilson v. Martin, 27 Ga. App. 549, 109 S. E. 294; Bauman v. McManus, 75 Kan. 106, 89 P. 923; Welch v. Bombardieri, 252 Mass. 84, 147 N. E. 595. *Contra,* Gould v. Cates Chair Co., 147 Ala. 629, 41 S. 675; Senner & Kaplan Co. v. Gera Mills, 185 App. D. 562, 173 N. Y. S. 265. This line of thought has been widely applied to the insurance field where applications for insurance solicited have been followed by unreasonable delay in giving notice of rejection. Witten v. Beacon Life Assn., 225 Mo. App. 317, 33 S. W. (2d) 989; Lechler v. Montana Life Ins. Co., 48 N. D. 644, 186 N. W. 271, 23 A. L. R. 1193 (application for reinstatement); Thompson v. Postal Life Ins. Co., 226 N. Y. 363, 123 N. E. 750 (reinstatement); Stanton v. Equitable Life Assurance Soc., 137 S. C. 396, 135 S. E. 367 (receipt of rejection by applicant required); Kukuska v. Home Mutual Hail-Tornado Ins. Co., 204 Wis. 166, 235 N. W. 403. *See also* De Ford v. New York Life Ins. Co., 75 Colo. 146, 224 P. 1049; Swentusky v. Prudential Ins. Co., 116 Conn. 526, 156 A. 686; Strand v. Bankers Life Ins. Co., 115 Neb. 357, 213 N. W. 349 (dictum); Security Ins. Co. v. Cameron, 85 Okl. 451, 205 P. 151, 27 A. L. R. 444; Dyer v. Missouri State Life Ins. Co., 132 Wash. 378, 232 P. 346, 135 Wash. 693, 236 P. 807. *Contra,* Miller v. Illinois Life Ins. Co., 255 Ill. App. 586; N. W. Mutual Life Ins. Co. v. Neafus, 145 Ky. 563, 140 S. W. 1026, 36 L. R. A. (N. S.) 1211; Columbia Nat. Life Ins. Co. v. Lemmons, 96 Okl. 228, 222 P. 225; Northern Neck Mutual Fire Assn. v. Turlington, 136 Va. 44, 116 S. E. 363; Stray v. Western States Life Ins. Co., 163 Wash. 329, 300 P. 1046, 75 A. L. R. 950.

12. 49 Harv. L. Rev. 1225.

13. 26 Harv. L. Rev. 429, 436.

14. 13 Ill. L. Rev. 667.

15. The cases on subscriptions are collected in Williston, Contracts (2 ed.), §116. Other promises similarly enforced on the basis of what the writer has called "promissory estoppel" are collected in Williston, Contracts (2 ed.), §139.

16. "'Promissory estoppel' is now a recognized species of consideration (Restatement of Contracts, §90)." Porter v. Comm'r of Internal Revenue, 60 F. (2d) 673, 675, per L. Hand, J.

17. In support of this section see: Callan v. Andrews, 48 F. (2d) 118 (C. C. A. 2); Porter v. Comm'r of Internal Revenue, 60 F. (2d) 673 (C. C. A. 2) (*cf.* Baird co. v. Gimbel Bros. Co., 64 F. [2d] 344 [C. C. A. 2], crit. [1933] 20 Va.

CONTRACTS UNDER SEAL

The Restatement of Contracts gives the rules of the common law in regard to contracts under seal, but as stated in a special note to the chapter on the subject, the law has been changed by statute in many states. Indeed, probably not more than a dozen states still retain the rule that a sealed promise is binding without consideration.

In many states the distinction between sealed and unsealed written contracts is in terms abolished.[18] This is true in Alaska, Arizona, Arkansas, California, Colorado, Idaho, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wyoming.

In most of these states it is also enacted that any written contract shall be presumed to have been made for sufficient consideration. Arizona, California, Idaho, Iowa, Kansas, Kentucky, Missouri, Montana, North Dakota, South Dakota, Tennessee, Texas have such provisions.

In other states it is enacted only that sealed contracts shall be presumed in the absence of contrary evidence to have been made for sufficient consideration, and in such states sealed contracts differ from ordinary written contracts to this extent. This is the law in Alabama, Illinois, Michigan, Oregon, Wisconsin. The statute in New Jersey is in form the same, but the presumption of consideration is held conclusive.[19]

The statute in New York, until 1935, also provided that a seal upon an executory promise created a presumption of consideration, and this presumption was held to be disputable. The common law, however, was wisely allowed to remain in force as to releases or discharges, so that it was possible to secure the object, frequently desirable, of making a gratuitous discharge.[20] In 1935, New York amended its statute by providing that a seal on a written instrument should not be either conclusive or presumptive evidence of consideration.[21] The use of seals, however, was not abolished and presumably a contract under seal still retains the longer period of twenty years applicable for limitation of actions, and the undisclosed principal of the maker of a sealed promise cannot sue or be sued. But, the obnoxious rule of the common law that an instrument under seal can be varied by a later agreement only if it also is under seal[22] was done away with by the same statute. By statutes enacted a year previously,[23] the difficulty of discharging a debt gratuitously or by payment of less than the undisputed liquidated amount thereof was disposed of by provisions in effect that any written instrument signed by the parties to discharge a debt or other obligation or to extend it to a fixed or determinable time should be valid without consideration other than such mutual agreement. In 1936 an amending statute was enacted[24] covering the ground of the statute of 1934, and amplifying it. The statute provided that, "An agreement to change, modify or discharge in whole or in part, any contract, obligation or lease or mortgage or other security interest in real or personal property shall not be invalid because of the absence of consideration, if in writing signed by the promisor."

This statute cured the unfortunate requirement of the earlier statute which provided, contrary to business practice, that both parties must sign a written gratuitous release or discharge. The new statute also opens a possible way for disposing of another difficulty that has troubled the courts. Where A and B have entered into a contract, for instance, for a building or other construction, and A, the contractor, during the progress of the work desires further compensation beyond that for which the contract provides, and the employer promises it, the rule has been general[25] and supported by the Restatement[26] that the employer's promise is invalid for want of consideration. This has represented the New York law.[27] But now the promise of added compensation is valid if contained in a writing signed by the promisor, and indeed any new promise whatever and any discharge of obligation thus executed becomes valid, if it relates to an existing con-

L. Rev. 214 and [1933] 28 Ill. L. Rev. 419); Port Huron Mach. Co. v. Wohlers, 207 Ia. 826, 221 N. W. 843; Greiner v. Greiner, 131 Kan. 760, 293 P. 759; Anderson v. Truitt, 158 Md. 193, 148 A. 223; Lusk v. Universal Credit Co., 164 Miss. 693, 145 S. 623; Carter v. Burns, 332 Mo. 1128, 61 S. W. (2d) 933; Alleghany College v. Nat'l Chautauqua County Bk., 246 N. Y. 369, 159 N. E. 173, 57 A. L. R. 980, noted, (1928) 13 Corn L. Q. 270; First M. E. Church v. Howard, 133 Misc. 723, 233 N. Y. S. 451; Saunders Co. v. Galbraith, 40 Oh. App. 155, 178 N. E. 34, commented on (1932) 80 U. Pa. L. Rev. 594; Union Trust co. of Pittsburgh v. Long, 309 Pa. 470, 164 A. 346; Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 A. 571, and comment thereon (1932) 32 Col. L. Rev. 1431. Saunders Co. v. Galbraith, *supra*, is a leading case in holding that presumptively the American Law Institute's Restatement of the law is correct, and "that of its own vigor it is adequate authority." *But see* Comfort v. McCorkle, 149 Misc. 826, 268 N. Y. S. 192, unadvisedly attempting to limit §90 to cases of charitable subscriptions and other promises to make gifts.

18. References to the statutes changing the common law on the subject are collected in Williston, Contracts (2 ed.), §218.

19. Aller v. Aller, 40 N. J. L. 446; Braden v. Ward, 42 N. J. L. 518; Waln v. Waln, 58 N. J. L. 640, 34 A. 1068; United & Globe Rubber Mfg. Co. v. Conrad, 80 N. J. L. 286, 78 A. 203, Ann. Cas. 1912A 412, 414. This construction virtually restricts the effect of the statute to little if anything more than a provision that recitals of consideration are not conclusive, and that failure of consideration may be shown. Both of these propositions would now be universally admitted without a statute.

20. See note on seals in New York, 21 Cornell L. Q. 177.

21. Laws, 1935, c. 708, amending Civ. Prac. Act, §342.

22. This rule, though got rid of in most states without the aid of statute, has been held in a number of them still in force unless the variation is executed. Williston, Contracts (1 ed.), §1836. New York was in this group. Cammack v. Slattery, 241 N. Y. 39, 148 N. E. 781.

23. Laws, 1934, c. 142, 143, 898.

24. Laws, 1936, c. 281.

25. Williston, Contracts (2 ed.), §130.

26. §76 (a).

27. Vanderbilt v. Schreyer, 91 N. Y. 392; Weed v. Spears, 193 N. Y. 289, 86 N. E. 10; McGovern v. New York, 234 N. Y. 377, 138 N. E. 26, 25 A. L. R. 1442; Maurice O'Meara Co. v. National Bank of N. Y., 239 N. Y. 386, 146 N. E. 636, 39 A. L. R. 747.

The decision of Schwartzreich v. Bauman-Basch, Inc., 231 N. Y. 196, 131 N. E. 887, is curiously at variance, where the court, after stating the obvious fact that parties may rescind an existing contract and make a new one in its place, adds: "We are also of the opinion that reason and authority support the conclusion that both transactions can take place at the same time." Of course they may, provided that there is sufficient consideration, but if in the old contract and in the new one, the performance on one side remains the same and that on the other side includes all that was promised before and also something additional, it is obvious that when the transaction is analyzed there is nothing to it but a promise to pay an additional sum for a promise to do what the promisor was already bound to do. "That which we call a rose by any other name would smell as sweet," and a promise without consideration is no better when masquerading under the name of gift, waiver, or rescission. If the rescission precedes the new agreement, of course the freedom then enjoyed by each contractor to refuse to make any contract has the effect of making the promise of any performance whatever sufficient to support any other promise.

tract or debt. New York may now be thought to have a substitute for the sealed writing of the common law; and the substitute may well be regarded as more desirable than the method of making effective gratuitous promises or releases that the common law afforded by means of a seal. It is less technical and less open to possible fraudulent manufacture.

In a great majority of the states, however, it is impossible to make an effective gratuitous promise, and in a somewhat smaller but still large number of states, a gratuitous agreement to make a present or a future discharge of a debt is equally inoperative. Side by side with the feeling of hostility to the doctrine of consideration that has been alluded to, there seems to be a hostility not only to the one means that the common law provided for avoiding the necessity of consideration—an instrument under seal, but to a reasonable alternative method of achieving that result. The Commissioners on Uniform State Laws in 1925 recommended a statute, the "Uniform Written Obligations Act," which provided that a signed written release or promise containing the additional express statement in any form of language that the signer intended to be legally bound should not be invalid for lack of consideration. This statute which its author ventures to assert provides a moderate and reasonable means of what is often a desired and desirable result, otherwise impossible where the common-law effect of seals has been abolished, has not been favorably received by legislative bodies. Pennsylvania[28] and Utah[29] have thus far been the only states to enact it. Thus, when, during the years of depression, a landlord had consented to reduce the rent of a tenant to an amount more in accordance with changed values, and subsequently, in spite of the tenant's compliance with the agreement for a readjusted rental, brought an action for the portion of the rent that he had agreed to forego, courts were compelled either to allow recovery or to violate elementary principles of contract. Some courts chose one alternative, some the other;[30] neither was desirable. Lack of such a statute or one somewhat similar, like the recent New York statute, is sure to cause unfortunate consequences where seals no longer are a complete substitute for consideration.

THIRD PARTY BENEFICIARIES

Under the rules of the Restatement of Contracts both donee beneficiaries[31] and creditor beneficiaries[32] are given direct contractual rights. This was in accordance with the overwhelming weight of authority; and the Restatement will doubtless have influence in diminishing the number of dissenting states. Connecticut, Massachusetts, Michigan and Pennsylvania have been regarded as the primary opponents of any general rule allowing recovery. Connecticut, citing the Restatement, recently seems to have recognized fully the beneficiary's right;[33] Michigan, overruling or qualifying earlier decisions, now clearly allows a donee beneficiary to recover.[34] The Pennsylvania court quotes at length the provisions of the Restatement and referring to the decisions in other states says of them that the determinations "are so equitable and just" . . . "that we willingly join with our sister states in their conclusion on this subject;"[35] Massachusetts allows recovery by a creditor beneficiary by a creditor's bill, joining the debtor and the new promisor,[36] and the promisee under a donee beneficiary contract apparently can recover substantial damages and will hold them as trustee for the beneficiary,[37] but there is as yet no recognition of a direct right of a beneficiary.[38]

ASSIGNMENTS

It is obvious that it is impossible for one subject to a money debt or any other obligation to substitute, without the consent of the creditor, another person so completely in his stead that the latter becomes subject to the obligation and the original obligor relieved of it. Obvious as this is with reference to a unilateral obligation, when a duty is combined with a right in a bilateral contract, it not infrequently seems to be supposed that the whole transaction can be so completely assigned, unless the performance involved is personal in character, that the assignee is placed completely where the assignor was and the assignor is freed from obligation. Of course, the most that can be done, even where the performance on neither side of the contract is personal, is an assignment of the assignor's right under the contract coupled with a delegation of the performance of the duties thereunder, which the assignee promises the assignor to perform. If such an arrangement is made, the non-assigning party to the contract not only retains his original right against the assignor, but wherever creditor beneficiaries are allowed to recover from a new promisor, he acquires also a right against the assignee who has undertaken to carry out the delegated performance. This is clear, but parties do not always spell out their intentions in such detail. Cases are by no means uncommon where a party to a bilateral contract purports to "assign" the contract to another and nothing further is said to define what the parties mean. Those who drafted the Restatement of Contracts thought it desirable, in view of the frequency of such occurrences, to give an interpretation to the elliptical language of the parties. It was their belief that the parties intended a complete transfer of rights and duties, thinking that such a transfer was possible or that they at least contemplated an undertaking by the assignee to his assignor that the delegated performance would be carried out so that the assignor would by that performance be freed from liability. Moreover, it seemed clear that the law should give the latter effect even if the parties intended the first of these supposed purposes, since that is the nearest possible approach to their intention.

In the Restatement of Contracts it is, therefore, stated[39] that assignment by the assignee in such a case would be interpreted "in the absence of circumstances showing the contrary intention" as both an assent to

28. In 1927.
29. In 1929.
30. Williston, Contracts (2 ed.), §120, n. 4.
31. §135.
32. §136.
33. Schneider v. Ferrigno, 110 Conn. 86, 147 A. 303. *See also* Byram Lumber & Supply Co. v. Page, 109 Conn. 256, 260, 146 A. 293; Tarcyak v. Bakasis, 120 Conn. 656, 182 A. 406.
34. Smith v. Thompson, 250 Mich. 302, 230 N. W. 156.
35. Commonwealth *ex rel.* Schnader v. Great American Indemnity Co., 312 Pa. 183, 167 A. 793. The decision held a surety company on a contractor's bond to the Commonwealth liable in accordance with the terms of the bond to creditors of the contractor. In view of the quotations and language of the court, it seems almost certain that instead of the confused and partial recognition of a beneficiary's right previously existing in Pennsylvania, there will now be a full acceptance of the rules of the Restatement.
36. Forbes v. Thorpe, 209 Mass. 570, 95 N. E. 955; Gillis v. Bonelli-Adams Co., 284 Mass. 176, 187 N. E. 535; Collins Mfg. Co. v. Wickwire-Spencer Co., 14 F. (2d) 871 (C. C. A. 1).
37. See Wright v. Vermont L. Ins. Co., 164 Mass. 302, 41 N. E. 303; Grime v. Borden, 166 Mass. 198, 44 N. E. 216.
38. Central Supply Co. v. United States Fidelity & Guaranty Co., 273 Mass. 139, 173 N. E. 697.
39. §164.

become an assignee of the assignor's right and as a promise to the assignor to assume the performance of the assignor's duties.

This section of the Restatement came before the New York Court of Appeals in a case where one who had contracted to purchase land had assigned to A who in turn assigned to B.[40] The court cited cases supporting the proposition that in the absence of express assumption of the duties under such a contract, the assignee could not be held liable to the vendor. The assignment was therefore held to give the assignee an option but no duty to perform. There are many cases of similar assignments by purchasers of land, supporting the New York decision,[41] and it is probable that their conclusion will be followed in that particular type of case. The analogy of an assignment by the purchaser in such a case to a sale of a mortgaged estate by the mortgagor is so obvious, and the difference between selling such an estate merely subject to the mortgage and selling it with an assumption by the purchaser of the mortgage is so well recognized in many jurisdictions that it is natural, and indeed proper, that a similar distinction should be made in regard to an assignment by a purchaser of land, that is between an assignment subject to the assignee's performance by payment of the price, and an assignment where the assignee assumes and agrees to pay the price.

This type of case, however, seems exceptional and in an ordinary mercantile contract the interpretation which the Restatement puts upon the agreement of the assignor and assignee seems justified, and supported by authority.[42] The situation in the land contract may perhaps fairly be regarded as one where there exist "circumstances showing a contrary intention" from that inferable in the case of other contracts.

RISK OF LOSS BETWEEN VENDOR AND PURCHASER

The United States inherited from England a peculiar doctrine in regard to the effect of the destruction or injury of real estate without the fault of either party during the period between the formation of the contract and the time for its performance. The ordinary rule, where one party to a bilateral contract for an agreed exchange fails to perform as he agreed, whether his failure is due to his fault or not, is that no recovery can be had on the promise of the other party; and this is stated as a general rule, without qualification, in the Restatement of Contracts.[43] In spite of the obvious justice of this principle, it was not that of the English law prior to the decisions of Lord Mansfield at the close of the third quarter of the eighteenth century. Before that time, promises in bilateral contracts were regarded as creating independent obligations and the innovation introduced by Lord Mansfield had not become fully recognized when the conservative Lord Eldon in 1801 decided the case which settled for the English law, as an exception to the general rule of mutual dependency in bilateral contracts, that after a contract to sell real estate the risk of its destruction rests on the purchaser.[44]

The English law naturally strongly influenced American decisions and in the majority of the states where the question has arisen the English law has been followed. Nevertheless, there has been a strong revolt,[45] and a tendency is now observable to apply in this class of cases, as in others, the rule of the Restatement both in law and in equity, unless the purchaser has been put in possession.[46] Where the purchaser is put in possession, as he is under the ordinary "land contract" which is frequently used in many states as a substitute for a conveyance with a purchase money mortgage back to the vendor, the purchaser is, like the buyer of goods under a conditional sale, the beneficial owner of the property; and since he has the use of all beneficial incidents of the property, he should also bear the risk of incidental loss.

In the summer of 1936, the Commissioners on Uniform State Laws recommended for enactment a statute embodying the principles that, until possession or title had been transferred, the risk remained with the seller and thereafter passed to the purchaser. This statute was enacted in substance in New York[47] and was also passed by the legislature in Massachusetts, but, unfortunately, vetoed by Governor Curley without consultation with the proponents. In the future it is to be expected that the Act will be adopted by at least some of the other states.

ANTICIPATORY BREACH

Doubts as to the limits of the doctrine of anticipatory breach, raised by earlier decisions of lower federal courts, have been somewhat cleared away by recent cases in the Supreme Court of the United States. In 1926, the Circuit Court of Appeals for the 6th Circuit decided in the case of Federal Life Insurance Co. v. Rascoe,[48] that the insured under a policy of disability insurance, by which instalments of money were promised during the continuance of disability, when aggrieved by a decision of the company that disability had ceased and that no more payments would be made, might, on a verdict of the jury that the disability was permanent, recover not only overdue payments but the present value of all future payments, based on the insured's expectation of life under mortality tables. Denison, J., dissented. The decision carried the right to recover for an anticipatory breach beyond what had previously been permitted.

There had been an actual breach of contract by the defendant in view of the jury's finding that the plaintiff was still disabled, but this breach related only to instalments of money due when the action was brought. Where a debt is due in instalments for a consideration that has been given, non-payment of one instalment does not accelerate the maturity of the others, so that, in allowing recovery of the full obligation of the policy, the court was treating it as broken by anticipation so far as future payments were concerned. The court tried to meet the point that as to future instalments there were simply unilateral obligations, which the Supreme Court of the United States[49] as well as other courts[50] had said could not be broken by anticipation, by arguing that the contract should be treated like a bilateral con-

40. Langel v. Betz, 250 N. Y. 159, 164 N. E. 890.
41. The cases are collected in Williston, Contracts (2 ed.), §418A, n. 3.
42. *Id.*, §418, n. 2.
43. §274.
44. Paine v. Meller, 6 Ves. 349.
45. The decisions are collected in Williston, Contracts (2 ed.), §928.
46. See especially, Anderson v. Yaworski, 120 Conn. 390, 181 A. 205, 101 A. L. R. 1232 (overruling statement in Hough v. City Fire Ins. Co., 29 Conn. 10), and Appleton Electric Co. v. Rogers, 200 Wis. 331, 228 N. W. 505.
47. Real Property Law, §240A. The enactment was upon the recommendation of the Law Revision Commission.
48. 12 F. (2d) 693 (C. C. A. 6), cert. denied 273 U. S. 722.
49. Roehm v. Horst, 178 U. S. 1, 17, 20 S. Ct. 780, 44 L. Ed. 953.
50. The cases are collected in Williston, Contracts (2 ed.), §1328.

tract, still executory on both sides, since the right of the insured by the terms of the policy was conditional on periodical medical examinations to determine the continued existence of disability.

It may be admitted that a conditional unilateral contract might properly be brought within the doctrine of anticipatory breach, but this will be true only when the performance of the condition is the real exchange for what is promised.[51] Such is the situation in a contract of option where the promisee on rendering a certain performance which is optional with him, will become entitled to the performance of the promise. In such a case the fundamental reason for allowing suit on an anticipatory breach is the same as in the case of a bilateral contract, namely, the avoidance of any question of performance of an agreed exchange by the injured party. Moreover, as the damages where a bilateral contract is broken are based only on the difference in the value of the two performances, the penal character of compelling their payment before the time fixed for performance under the contract does not seem striking Similarly, under a contract of option, the measure of damages is the difference between the values of the respective performances. But under a policy of disability insurance, the disability, though a condition essential to recover, is not the exchange for the promise. The premium pays for the policy and if the insured is entitled to recover, his recovery is based on the full amount of the insurance; and that was, in fact, the recovery allowed in the case under discussion, with a rebate only of interest. It was a bald case of compelling payment of a money debt before it was due.

Such a decision was sure to be popular with holders of disability policies, eager to substitute once for all a verdict of a jury for the opinion of medical officers of an insurance company. Other decisions to the same effect followed; but courts were not unanimous. Some of the federal courts and most of the state courts to which the same question was submitted decided adversely to the plaintiff's claim to recover for unmatured instalments.[52] In Mobley v. New York Life Insurance Co.,[53] the question came before the Supreme Court of the United States and the plaintiff was denied recovery; but in view of the opening left by the statement in the Court's decision that where the validity of the policy was admitted by the insurer a denial made in good faith that the plaintiff had brought himself within its terms was not such a repudiation as to justify immediate action, there remained a possibility for the contention that where the insurer's refusal was unreasonable, or so unreasonable as to be evidence of bad faith, an immediate action would lie for recovery on the entire policy. On this theory the Circuit Court of Appeals for the first Circuit allowed recovery in the later case of Viglas v. New York Life Ins. Co.,[54] but the decision was reversed by the Supreme Court,[55] and the Rascoe case which had been disapproved in the Mobley case was again expressly disapproved. It can hardly be doubted that few courts will hereafter allow recovery of future instalments of an insurance policy or of any other instalment contract where the consideration has been fully paid, and where all that remains to be performed is a series of fixed payments.

In the decisions of the Supreme Court just referred to, it has definitely given its adhesion not only to the limitation discussed above but also to the requirement as a necessary basis for anticipatory recovery that there shall be either total repudiation of all obligation under the contract in question, or an insistence in bad faith that some condition in the contract will not be complied with. This is a comparatively new doctrine,[56] for which there is no express warrant in the language of the courts in the cases originating the doctrine of anticipatory breach. It is true that in these cases there was doubtless a total repudiation of all obligation, but later decisions holding that insistence on a misinterpretation of a contract, coupled with an assertion that performance would be rendered under the contract only when thus interpreted,[57] amounted to an anticipatory breach had not stated that good faith or bad faith had any bearing on the question. The new doctrine emphasises the tort aspect of repudiation, which has been much insisted upon by some writers;[58] but recovery when allowed for anticipatory repudiation is allowed on a contractual basis, and it is hard to see from that point of view what difference good faith makes in a refusal to perform a contract. Reasonable as the new doctrine seems from an ethical standard, it does not aid in a logical explanation of the right to sue on a promise when the promiser has not broken it but merely said that he intends to do so; and the difficulties of a promisee in determining his rights are certainly increased if he must decide at his peril whether a repudiation is made in good faith. From his standpoint it makes no difference why the repudiator intends not to perform his obligation. The Restatement of Contracts makes no qualification of its statements as to what constitutes actionable repudiation, according to the good faith or the bad faith of the repudiator.

51. Compare, Rest., Contracts, §318.

52. The cases are collected in Mobley v. New York L. Ins. Co., 74 F. (2d) 588 (C. C. A. 5), affd., see following note.

53. 295 U. S. 632, 55 S. Ct. 876, 79 L. Ed. 1621, 99 A. L. R. 1166.

54. 78 F. (2d) 829 (C. C. A. 1), revd., see following note.

55. New York L. Ins. Co. v. Viglas, 297 U. S. 672, 56 S. Ct. 615, 80 L. Ed. 971.

56. It is supported by Dimon Corp. v. Federal Sugar Ref. Co., 215 App. D. 140, 213 N. Y. S. 106; Goerlitz v. American Linseed Co., 117 Okl. 299, 246 P. 240; Agostini v. Consolvo, 154 Va. 203, 153 S. E. 676; Myrold v. Northern Wisconsin Tobacco Pool, 206 Wis. 244, 239 N. W. 422.

57. Milton v. Stone Lum. Co., 36 F. (2d) 583; Suburban Improvement Co. v. Scott Lum. Co., 67 F. (2d) 335, 90 A. L. R. 330 (C. C. A. 4); Kimel v. Missouri State L. Ins. Co., 71 F. (2d) 921 (C. C. A. 10), noted, (1935) 35 Col. L. Rev. 105; Box v. Metropolitan L. Ins. Co., 232 Ala. 447, 168 S. 220; Mutual L. Ins. Co. v. Marsh, 186 Ark. 861, 869, 56 S. W. (2d) 433; Massachusetts Protective Assn. v. Jurney, 188 Ark. 821, 68 S. W. (2d) 455; Indiana L. Endowment Co. v. Reed, 54 Ind. App. 450, 103 N. E. 77; St. Regis Paper Co. v. Santa Clara Lum. Co., 186 N. Y. 89, 78 N. E. 701; Donlen v. Fidelity, etc., Co., 117 Misc. 414, 192 N. Y. S. 513; Mowry v. Kirk, 19 Oh. St. 375, 383; Southern Pub. Assn. v. Clement's Paper Co., 139 Tenn. 429, 201 S. W. 745, L. R. A. 1918D 580; Armstrong v. Ross, 61 W. Va. 38, 55 S. E. 895.

58. See especially, Professor Vold, The Tort Aspect of Anticipatory Repudiation of Contracts, (1928) 41 Harv. L. Rev. 340.

Chicago Bar Association's Legal Court of Honor—Its First Case Shows Effectiveness of Remedy Provided

THE Chicago Bar Association now offers its members a forum where, in proper cases, a member may have an opportunity to protect himself against some of the effects of an unwarranted attack upon his integrity as a lawyer. Whenever a member feels that his professional reputation has been damaged by an unjust attack upon his conduct he may file application requesting the Association to investigate that conduct and to determine whether or not such attack was justified.

This application is in effect a complaint by the lawyer against himself. Complaints of other persons against lawyers received by the Chicago Bar Association normally go to the Committee on Inquiry and from that committee, after preliminary investigation, may go to the Committee on Grievances as a disciplinary proceeding ultimately to be disposed of by a decision of the Illinois Supreme Court. Where, however, the complaint is brought by the lawyer himself the Committee on Professional Ethics is the body that investigates his acts. That committee in its discretion may hear and decide the matter and also may take whatever steps it deems proper in an attempt to nullify or correct the damage sustained by the lawyer so falsely charged.

This new function of the Committee on Professional Ethics was added by action of the Board of Managers of the Bar Association who feel that the Association membership is entitled, in proper cases, to the protection that such a remedy may afford.

Case number 1 on the docket of this legal court of honor illustrates not only the nature of the cases for which this mode of relief was provided but also the character of the results which this court should obtain for its litigants.

The facts of the first case briefly were that, upon a report of the referee in bankruptcy, a judge had denied fees to certain named lawyers, including "X," and had criticised the applicants for fees for delaying the bankruptcy proceeding, taking the occasion also to rebuke a certain lay agency and the lawyers involved for their conduct in bankruptcy proceedings generally. Chicago newspapers reported the case in an apparently correct manner but, by reference in the same article both to the denial of fees and to the rebuke, had inferentially connected "X" with the delays which caused the rebuke. The formal introductory part of the report of the referee in question contained a general summary of the record incorrectly grouping "X" and his law firm with certain other named lawyers as being applicants for fees out of the bankrupt estate (incidentally designating incorrectly one of the applicants as a partner of "X's" law firm). This report, however contained no further reference to "X" and the recommendations that fees be denied omitted all reference to "X" or his law firm.

Neither "X" nor his law firm had applied for fees out of the estate and their conduct in the litigation had not delayed the administration of the estate. Not considering himself involved in the proceeding, "X" was not in court. The newspapers refused to publish a retraction of the stories so far as they named "X" because to have done so would have been contrary to the record, but one of the newspapers did carry a statement that "X" had stated that there was no such law firm as reported in the earlier article. The principal effect of that retraction probably was to emphasize the unfavorable publicity already given to "X." "X" in his application to the Bar Association claimed that some of his clients in other bankruptcy matters had told him they had read the newspaper accounts just referred to and were apparently considering the advisability of discharging "X" because of what had happened. The Bar Association called the attention of the court to the record but was unable to cause the report to be corrected by the referee, because at the time of the investigation he was out of the city and would be absent for a considerable period of time. The court, however, upon the matter being called to its attention by the Bar Association, forthwith suggested the filing of a petition by "X" and upon that petition corrected the record to conform to the facts. The newspapers then carried the story of the court's latest action in the matter.

Original publicity was on June 29 and June 30. The matter was brought by "X" to the attention of the Board of Managers of the Chicago Bar Association on July 2 and on that day the Board ordered the matter entertained by the Committee on Professional Ethics. "X" was notified and on July 9 filed a statement with the Committee on Professional Ethics. The next day the committee met, considered the matter and appointed a sub-committee of one to investigate the facts. The sub-committee commenced his investigation the same day and on July 17 reported that he had found the statement of "X" in its material representations of facts to be true. The committee thereupon authorized the sub-committee to take whatever action in the premises he deemed advisable, and on the same day, July 17, the sub-committee saw the judge and the judge had "X" before him within an hour after the conference and on "X's" motion, then presented, an order was entered correcting the record. The two newspapers which carried the story of the original order, gave appropriate publicity to the correction on July 18 and July 20 and the committee on July 24 received a final report upon the case and closed its file to the satisfaction of all parties concerned.

Thus within eight days from the filing of the matter, the committee accomplished its purpose. The whole matter, as will be seen from these dates, was satisfactorily adjusted within three weeks from the original damaging publicity.

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TRUSTEES UNDER INDENTURES

Report of the Securities and Exchange Commission on Subject is Frankly an Argument for Reorienting the Entire Indenture by Casting the Trustee as the Principal Actor—Two Chief Suggestions Contained in Report—Four Possible Points of Disagreement Discussed*

By Benjamin Wham
Member of the Chicago Bar

I

ONE of the most interesting studies conducted by a governmental agency is that now being made by the Securities and Exchange Commission on the Work, Activities, Personnel and Function of Protective and Reorganization Committees. This study was undertaken in pursuance of Section 211 of the Securities Exchange Act of 1934. The Commission has divided the study into various parts and is making separate Reports as to each. At the present time three Reports have been made.

In the first Report, dealing with Municipal Obligations issued last May, great weight was placed on the necessity of reorganizations under the new section of the Bankruptcy Act. However, this section shortly thereafter was declared unconstitutional. The second Report, on Committees for Real Estate Bondholders issued last June, appears to be an effort to establish certain preconceived and even hostile (albeit honest) notions. It, like the other Reports,[1] pictures accepted practices unfavorably, stresses defects, and neglects the good points of the present method of reorganization. But, after painting all the clouds sans silver linings, it reserves specific recommendations until the completion of the study.

However, in the report on Trustees Under Indentures, issued later in June, third and last at this time, all caution is again thrown to the winds. It is frankly an argument in favor of reorienting the entire indenture by casting the trustee as the principal actor. It would appear that under the present system the trustee's inaction resembles that of Alice's Dormouse and that its traditional role is to sit between the Hatter, the issuing company, and the March Hare, the underwriter, and sleep calmly on while the assets are being dissipated. It would even appear that the trustee under the hypnotic spell of interlocking directorates or joint ownership of equities and other adverse interests, sometimes actively connives with the issuer and underwriter to practice devious deceptions upon security holders.

The Report contains two chief suggestions: one, that the trustee be active throughout the life of the indenture, and two, that it be divorced from all interests adverse to the security holders. It contains the further suggestion that individuals no longer serve as indenture trustees, but only banks and trust companies with resources commensurate with the proposed trusteeship. Parenthetically we should point out that these suggestions go far beyond the field of reorganizations.

It would appear that the major premise for these recommendations is paternalistic, namely, that security holders, in addition to the protection which is afforded them by state and federal securities and fraud laws and the present methods of reorganization, are also entitled to a wet nurse. But assuming they are, is the so-called trustee necessarily the logical candidate for this ancient calling? Students of the subject may well disagree with these conclusions due in part to a different interpretation of the facts from which they stem. We shall discuss four possible points of disagreement:

(1) The first is the Commission's assumption that a prominent financial institution is customarily selected as a so-called "trustee" to hold title to the property for the security holders, to certify the securities and perform the other ministerial dutes connected with the position, its name featured in the sales literature, and thus the securities are purchased under the justifiable assumption that the trustee is active and will fully represent the holders at all times against the issuer and underwriter. The gist of this assumption is that in this manner a fraud is perpetrated upon the security holders.

Four reasons why this interpretation of the facts is erroneous occur to the writer: (a) The first is in the nature of a plea of the general issue. The writer has examined a number of recent prospectuses and has in several instances been hardly able to find the name of the trustee. Thus in the $175,000,000 25-year 3¼% debenture issue dated October 1, 1936, of American Telephone and Telegraph Company, the first mention of the trustee's name appears on page 19 of the prospectus, which, by the way, is fifty-one pages in length. Similarly we have examined a number of other recent prospectuses for new as well as refunding issues and have found that in no instance was the name of the trustee featured in any respect. In addition, it is noteworthy that the name of the trustee is seldom mentioned and never featured in the newpaper advertisements of security issues.

Then it would appear that the Commission has become a trifle confused in its separate Reports, for in the Report on Real Estate Bonds much space is devoted to the fact that individual officers of the houses of issue served as trustees under indentures. Obviously there was no attempt to deceive security holders in such cases by the use of prominent banking institutions as trustees.

(b) The second reason inheres in the origin and history of indenture trusteeships. At the inception of this form of financing private enterprise there was no belief on the part of security holders

*Paper read before the Winnebago County Bar Association, Rockford, Illinois, December 11, 1936.

1. Frye and Dimock, Review of Report on Municipal Obligations, Yale L. J. (Nov., 1936) p. 186.

or anyone else that the trustee was an active defender of their interests. In fact there have been mortgages in this country which placed title to the property in all the bondholders to be held jointly by them, thus eliminating the trustee. Until very recently this was the regular practice in England. The first instrument of this type of which there is a record in the United States was issued in 1830. There were a few more in the 1830's and perhaps a score in the 1840's. In the earliest examples the documents were rather escrow agreements than deeds of trust; the trustee was a mere stakeholder. The first true mortgage to a trustee is reported in 1839. During this period there was no indication that the so-called "trustee" was thought to have any other function than that of a dry trustee, that is to hold the legal title. It was not at all uncommon to have an officer of the issuing company act as trustee and the inference was clear that the latter was not deemed to be a representative of the bondholders' interests.[2]

(c) The third reason militating against the assumption that the trustee is an active representative of the security holders is that the trustee also represents the issuer. While the ordinary trustee represents his beneficiary solely, as the latter's interests are the only interests which he must protect, the "corporate trustee must see not only to the interests of security holders but in a measure also to those of the issuing company"; as "for some purposes he represents one, for some the other, and for still other purposes he represents both . . ."[3]

(d) The fourth reason is that it would appear the Commission does not intend for the trustee to be active throughout the life of the indenture. The essence of the word "active" when applied to a trustee is that he actually take charge of and manage the business. To a practical business man nothing could be more absurd than to suggest that the indenture trustee should at once assume active charge of a business. How many trust companies and trust departments of banks would accept the active management of many companies or have them intrusted to them in lieu of the seasoned specialized management which they now have? We venture to assert that even a suggestion that this is being seriously considered for many companies would cause the market on their securities to drop at least ten points.

What the Report surely means is that the trustee should be active only in certain specified ways: for example, to see that the indenture is properly drafted and recorded, that the correct amount of securities are certified, that additional securities are issued in accordance with the terms of the indenture, that the proceeds are properly applied, that all the provisions of the indenture are performed, and on the happening of an event of default that proper steps be taken to notify the security holders and to see that they are properly represented.

We are in accord with this general objective. Of course the indenture should be properly drafted and recorded and the correct number of securities issued and the other provisions of the indenture carried out, and the security holder protected from loss in so far as possible! Who is so foolish or so lacking in public morals as to disagree? But it is not so clear who should be responsible for these things. It all seems very simple in theory to say, "Why the trustee, of course! It is called a trustee so let us make it a trustee in fact." However, it is not so simple in actual practice. Suppose the number of securities to be issued depends upon the value of the property and its earnings. Suppose the proceeds are to be paid out only after certain improvements have been made. Suppose any number of conditions that appear commonly in indentures.

Many trustees do actually go to considerable length to satisfy themselves that the provisions of the indenture are being carried out. But it is another thing to make them financially responsible, particularly when their compensation is incommensurate with the liabilities to which they would be subjected and their greatly enlarged duties. Furthermore, it is extremely doubtful if the additional trustee's fees necessarily paid for this duplication by the trustee of the functions and responsibilities of the issuer will give commensurately greater protection. Indentures usually provide that trustees may rely upon the certificate of the issuer as to performance. In all but a negligible percentage of cases these certificates are correct. It would seem that a more direct and less expensive remedy for this small percentage would be to impose additional duties and penalties upon the issuer and underwriter rather than the trustee.

This possibility is recognized in the Report in connection with the method of supervising the expenditure of the proceeds of an issue.[4] The Commission suggests that the trustee may be largely relieved of this obligation by the issuing company filing a certificate with the Commission as to the disposition of the proceeds.

It is difficult to reconcile the Commission's attitude in this instance with its heated argument over many pages against exculpatory clauses. These permit the trustee to rely upon certificates of the issuer and underwriter and relieve it from liability except for gross negligence and willful misconduct, and have been developed over many years no doubt in recognition of the logical division of duties between issuers, underwriters and trustees.[5] Why is it not just as reasonable to require the issuing company to file the same kind of certificate with the Commission as to the other acts required of it? And why not place some of the burden on the underwriter, especially to see that the indenture is properly drafted and to protect security holders on the happening of an event of default?

2. For a discussion of the subject matter of this paragraph see Note in 1933 Col. L. Rev. p. 97, Immunity Clauses in Corporate Indentures. See also the citations. It is argued in this Note as well as in some other recent articles and a few court decisions that indenture trustees should assume greater responsibilities (see Posner, Liability of the Trustee Under the Corporate Indenture, 42 Harv. L. Rev. 198 (Dec. 1928); Payne, Exculpatory Clauses, etc., 19 Cornell Law Quart. 171 (Feb. 1934); Comment on Protection for Debenture Holders, Nov. 1936 Yale Law J. p. 97).

3. Posner Liability of the Trustee, etc, cited Note 2.

4. See the Report p. 31.

5. In spite of the Commission's argument and cited instances to the contrary (see also Comment on Protection for Debenture Holders Nov. 1936 Yale L. J. p. 97), it would be appear that these clauses are especially necessary to protect trustees under debenture indentures as it is difficult to draft negative pledge clauses so they can be understood, or to enforce them.

(2) This leads to the second possible difference in interpretation of the facts upon which the Commission's recommendations are based. The Commission asserts that the underwriter does not truly represent the security holders, but is merely interested in selling the securities. From this it would appear that the Commission misunderstands the true function of an underwriter. In most cases the underwriter actually buys the issue in the first instance. The securities thus belong to it and, if it is unable to sell them to the public, continue to belong to it. It therefore has a very definite financial reason to see that the indenture is carefully drafted and the securities otherwise properly set up, in addition to the usual reasons for protecting its customers, namely, that it recognizes a duty, that this enables it to sell the securities more readily and that it wishes to maintain its reputation. It would be a duplication of work and expense to require the trustee to see to this also.

Much is made in the Report of the allegedly selfish uses supposedly being made by the underwriter of its list of security holders, i. e. to obtain a dominant position in the reorganization and so receive managerial and other fees and profits, to avoid or postpone discovery of illegal practices in the original sale of the securities, to gain greater recognition of its junior and equity interests in the reorganization plan, and the like, and the need which security holders have for this list in order to procure proper representation. We must of course agree with the Commission that fraudulent and unfair practices should be eliminated in so far as possible and that security holders are entitled to proper representation. However we are not convinced that the Commission has overcome the presumption that the underwriter is, generally speaking, able to render valuble service in reorganization.

Then, too, it is not clear that it would be an unmixed blessing to make the list of security holders generally available. It may be argued that, far from protecting security holders, it plays into the hands of a few obstructionists. The principle of majority and two-thirds rule is recognized in the new reorganization sections of the Bankruptcy Act. On behalf of the underwriter it should be pointed out that nine chances out of ten he used much the same list in the sale of the securities of other properties and businesses and thus this list is a valuable property right. It should also be pointed out that the fiscal agent either has or can compile a fairly complete list of those security holders to whom interest is paid. Presumably it is this list which may be made available to security holders in 77B proceedings.

(3) A third possible difference of interpretation of the facts upon which these recommendations are based may arise from the assumption of the Commission that upon the occurrence of an event of default an active trustee would give materially better protection to the interests of the security holders than at present. The Commission apparently envisages the active trustee as at all times poised and ready to spring instantaneously to the aid of the security holders. This assumption together with the Commission's grand passion for minority interests is perhaps the most unrealistic portion of the Report. It is undoubtedly actuated by a mixture of paternalistic philosophy and the assumption that the issuer and underwriter and possibly an inactive trustee are essentially dishonest.

Apparently the Commission fails to visualize what actually occurs upon the happening of an event of default. What usually occurs is this: the management has average honesty and intelligence, but for some reason usually beyond its control (certainly this was true during the recent depression) sales fall off, gross income drops and it is forced to default.[6] The underwriter may still have some of the securities, but, whether it does or not, its customers need protection and thus, as pointed out above, it appears to be a logical champion of their rights.

It is the writer's understanding that most trustees are perfectly willing in theory to be active after default. However, the chances are that the more responsibility is placed upon them the more careful they will be. It is a tremendous responsibility to throw a going concern into receivership. Many companies have been in technical default and later recovered without the necessity of intervention by the trustee. The possible loss to security holders of a few months' interest or profits, which apparently looms large in the eyes of the Commission, is really minor compared to the damage which may be done by too precipitate action; nor is the Commission's alarm over the failure of trustees, at times, to give immediate notice to security holders of threatened defaults entirely justified as it would often be unwise to publicize a company's difficulties while it may still pull through.

It seems reasonable to conclude that whenever possible the broad decision as to whether or not action should be taken on behalf of the security holders, and, if so, what it should be, should rest with the security holders themselves. It may be that this decision should properly be facilitated by placing some additional responsibility upon the trustee to assist in calling the first meeting and in the formation of a representative committee. Under the present set-up indenture trustees go even further and take direct action in some cases where essential to protect the interests of security holders. It thus is problematical whether any substantial benefits will result from an attempt to substitute mandatory for discretionary action of the trustee.

(4) The Report argues at length against trustees having interests which are adverse to those of security holders. It is undoubtedly true that a bank which is indenture trustee of a large bond issue, may make short term loans to the issuer, may act as paying agent, and may hold some of these bonds or junior securities of the issuer in its own portfolio or in that of one or more trust estates of which it is trustee. To the Commission each of these interests is in conflict with those of the security holders.

This leads to a fourth possible difference in interpretation of the facts underlying the Commission's suggestions, as, it may be argued, this conflict is more apparent than real and is more often beneficial than otherwise. There are many cases in which the issuing company would be unable to obtain a short term loan except from the bank with which it has done business for many years and

6. This was recognized by one of the members of the Commission prior to his appointment. See The Federal Securities Act 1933 by William O. Douglas and George E. Bates, 43 Yale L. Jour. 171 (Dec. 1933) at p. 171-2.

which also happens to be acting as indenture trustee for its bonds. Such a loan, far from being adverse, is really beneficial to the security holders, as it enables the company to continue in business and often pull through. This situation is analogous to the preference given under the six months rule in railroad receiverships to claims for materials which are necessary to keep the road in operation for the benefit of the public. In spite of this moral right to preference (if not legal) there are many instances in which a banking department subordinates its claim in order not to embarrass its trust department in its function as indenture trustee.

The Commission's solicitude for security holders and fear that equity and junior interests, particularly those belonging to the issuer, underwriter and trustee, will receive some recognition in reorganizations is in striking contrast to the general philosophy underlying the New Deal. Thus, under the new reorganization sections of the Bankruptcy Act mentioned above, equity and junior interests have consistently received more recognition than the actual dollar-and-cents value of their claims. State moratoria laws have been enacted for the sole purpose of staying foreclosure of properties and the wiping out of equities in the hope that as the depression passes these equities will regain some semblance of value. The purpose of the federal government in devaluing the gold content of the dollar was to bring about a rise in prices, thus adding to the value of equities as against debts. The junior and equity interests held by issuers and underwriters are in large part obtained by the investment of new money in an honest attempt to save the property or business from default. Certainly there does not appear to be any valid reason why these claims should not be presented by indenture trustees for whatever they are worth.

III.

Apparently one of the Commission's primary objectives is to remove issuers, underwriters, trustees and security holders from their present assumed freedom of contract and throw about them a rigid status of positive law. It may be pointed out that in so doing they are reversing the process through which civilization passed when it discarded the fixed relationships inherent in the feudal system. In fairness it should be said that they are not the first to suggest this, for we have been moving in this direction since the turn of the century.[7] However, in the last four years this movement has been shifted into high gear and the horn replaced with a siren whose pitch has been steadily rising.

We are confronted with the broad questions of constitutional law and public policy, which can only be suggested here, namely, can we and should we dictate from Washington the kind of securities which issuers must issue and buyers buy.[8] Of course we can and should attempt to prevent fraud. However we have had in force for many years one of the most drastic fraud acts, namely, the Federal Postal Fraud Act, and practically every state has some form of Blue Sky Act, and now we have the Federal Securities Act of 1933, in addition to other acts designed to regulate the business of finance.

It seems unnecessary to state that human nature remains much the same and that it is impossible to prevent all fraud by legislation any more than murder;—our chief dependence must continue to be upon the honesty of people in responsible positions, as this cannot be supplanted by questionaires, rules and formulae. If it becomes too difficult or expensive for a company to borrow money in any particular manner, other methods will be devised. If the Commission proceeds too hastily it may find that no sooner is one defect remedied to its satisfaction than another will arise, possibly due to the faulty remedy of the first; and thus these defects may shift about and reappear like the grains of sand in Wonderland which so perplexed and saddened the Walrus and the Carpenter.

7. Pound, Interpretation of Legal History p. 1 (1923); Pound, Introduction to the Philosophy of Law p. 78 et seq. (1922).

8. Cf. MacChesney in collaboration with Leesman, Mortgages, Foreclosures and Reorganizations, 31 Ill. L. R. 287 (Nov. 1936); also Carey etc. 27 Ill. L. Rev. 1, and subsequent issues (1933); McCollom, the Securities and Exchange Commission and Corporate Trustees, 36 Col. L. R. 1197 (December, 1936). (The last article came to the writer's attention after this paper was in final form. Particular attention is called to this article as it discusses at length the same subject that is covered herein.)

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Signed Articles

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view by the fact of publication, that the subject treated is one which merits attention.

LIBERTY OF TESTATION

Complete Liberty in This Respect in Early Roman and Anglo-Saxon Law—Various Sociological Types Which the Opposite Rule May Assume—The "Legitime Rule" in France and Its Effect on Agricultural Real Estate—Reduction of the "Legitime" to a Maintenance Claim of the Nearest Relatives in Mexico—How Long Will the Common Law Countries Maintain Unrestricted Liberty of Testation?—Indications of Trend in British Empire and the United States

By Arthur Nussbaum
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"I am surprised that ancient and modern jurists have not attributed to the law of descent a greater influence on human affairs. It is true that these laws belong to civil affairs; but they ought nevertheless to be placed at the head of all political institutions; for, while political laws are only the symbol of a nation's condition, they exercise an incredible influence upon its social state."

Alexis de Tocqueville,
Democracy in America, 1835, Book I, Ch. 3.

"THE transmission from generation to generation of vast fortunes by will, inheritance, or gift is not consistent with the ideals and sentiments of the American people. The desire to provide security for one's self and one's family is natural and wholesome, but it is adequately served by a reasonable inheritance. Great accumulations of wealth cannot be justified on the basis of personal and family security. In the last analysis such accumulations amount to the perpetuation of great and undesirable concentration of control in a relatively few individuals over the employment and welfare of many, many others. Such inherited economic power is as inconsistent with the ideals of this generation as inherited political power was inconsistent with the ideals of the generation which established our Government."

This is the language used by President Roosevelt in his message to Congress of June 19, 1935.[1] The immediate objective of the sentences quoted was the recommendation, by the President, of a progressive inheritance tax. But the legal philosophy behind it is of a broader scope. It touches upon basic principles of Anglo-American inheritance law which permit, to a much greater extent than does foreign law, the undivided transfer of the decedent's estate to a single individual heir. This Anglo-American "liberty of testation," a rule tremendously enhancing the potentialities of capital, and long uncontroverted in the common law countries, has already become to a certain degree, and may become even more so, a legislative problem. The traditional American point of view as to this subject is by no means self-evident.[2]

To be sure, liberty of testation was recognized in ancient Roman Law. The law of the Twelve Tables (5th century B. C.) proclaimed it by the monumental phrase "As he bequeathed shall be the law." In the first century B. C., however, a new conception, probably borrowed from Greek law, made its appearance: He who did not leave to his child at least a quarter of the child's normal intestate share, i. e., of the part the child would get in case of intestacy, was considered to be insane: the will was to be annulled and the child to get his intestate share. The fiction underlying this doctrine merely served, as do so many fictions in common law, the purpose of cloaking in familiar drapery a novel development of legal thought. It was laid aside in the first centuries of the Roman Empire during which the basic doctrine of civil law as to inheritance was elaborated. Certain nearest relatives are "compulsory" heirs, in the absence of weighty reasons to the contrary, i.e., entitled to a non-barrable interest in the estate, generally to a part of it. This interest is called today the "legitime" ("portio legitima"; the French term being "reserve," the German "Pflichtteil"). What is left to the disposal of the testator is the "disposable fraction" ("quotité disponible").

The rule indicated has been adopted, with various qualifications, by nearly all of the civil law countries including Scotland, the South American countries and the State of Louisiana. Only in Quebec where civil law, after an interruption, was restored in 1774, is absolute freedom of testation made an express proviso.[3] This was done on the demand of the English authorities who probably wanted to have the English traders and settlers enjoy in Canada also that freedom so familiar and valuable to them. However, England herself had recognized a legitime rule up to the 13th century. And that we are not faced with an artificial creation of Greek-Roman law may furthermore be inferred from the fact that the Koran, religious Code of the Moslems, provides for an elaborate legitime to the nearest relatives. The tie up of property with the family is, of course, still stronger in primitive law where no testation exists.

The peculiarity of the early Roman and the Anglo-Saxon law has aroused the interest of sociologists. Says Max Weber, (1864-1920) the most important German sociologist, in his posthumous "Sozialoeconomik" [Social Economy] published in 1921: "Complete, or nearly complete, liberty of testation is only recorded twice: as to Republican Rome and as to English Law;

1. See 74th Congress 1st Session, Senate Report No. 1240, p. 2. (regarding Revenue Bill of 1935).

2. As to history and foreign law regarding liberty of testation see McMurray, "Liberty of Testation and Some Modern Limitations Thereon," 14 Ill. L. R. 96 (1919), a very valuable study; Roguin "Traité de Droit civil comparé, Les successions" vol. IV (1912) n. 2051 et seq.; Bruns "Ueber Testierfreiheit und Pflichtteil" 2 Zeitschrift fuer vergleichende Rechtswissenschaft (1880) 161; 5 "Rechtsvergleichendes Handwoerterbuch" (1935), 622 et seq. ["Pflichtteilsrecht"].

3. See Dainow Unrestricted Testation in Quebec 10 Tulane L. R. 401 (1936).

in both cases for expanding nations ruled by a landed gentry. Today the most important territory recognizing liberty of testation, is the territory of greatest economic opportunities: the United States. In Rome, liberty of testation grew up under a bellicose expansion policy which promised a living on conquered land for the disinherited; it vanished through the legitime rule borrowed from Greek law when Rome's colonial period was coming to an end. In English law liberty of testation aimed at maintenance of fortunes within the great families, a goal which can be reached also by measures of a legally opposite, e. g., feudal, nature."

Associating liberty of testation with the spirit of pioneering seems to be a plausible hypothesis. This liberty indeed is quite in line with "rugged individualism. And it is equally true that liberty of testation at the same time favors the maintenance of aristocracy and is particularly valuable to an industrial aristocracy of the American type. The Roman aristocracy performed its social duties by military services, the English by political ones, the American by granting large gifts and legacies for humanitarian, educational and other "charitable" purposes. Again the American system is adaptable to the needs of the farmer, since the farm must be run by one of the children, a goal which can be attained by allowing liberty of testation. In England the effect of the doctrine is considerably restricted by the well-known customary marriage settlements which are not to any similar extent employed in this country. The American attitude, therefore, is extreme indeed.

The opposite rule which more or less disregards the intentions of the deceased in distributing his inheritance, may assume various sociological types.

The legitime rule has revealed trends toward democracy, and it has very distinctly assumed this character in French legal history. The Revolutionary Convention, in 1793, resolved entire abolition of the liberty of testation, in order to enforce equality among the children. This measure had been urged by Mirabeau, disinherited offspring of a noble family, in a famous address "Discours sur égalité des partages" read to the Convention, by his friend Talleyrand, 5th Sept. 1791, just an hour after the death of Mirabeau. This discourse condemns in brilliant phrases the whole institution of the will, which subjects the living to the command of the dead, as utterly inconsistent with logic and justice. [It was well denominated by a later writer "the will against the will."] The resolution of 1793 was, by subsequent decrees, considerably qualified, but it still influenced the Civil Code (1804). According to the latter, the "disposable fraction" amounts to a half of the estate, if there is one child, to one-third if there are two children, and to a quarter if there are three children or more; and this solution has been adopted by Belgium and the Netherlands, whereas under the German Civil Code the legitime amounts to the half of the intestate share in all cases.

The anti-aristocratic nature of the French rule is obvious, and it has never been more strikingly characterized than by a letter of Napoleon I to his brother Joseph whom he had made King of Naples. In his letter Napoleon pointed out that the Civil Code would take care of the destruction of the old nobility of the realm.[4] However, dismemberment will be the effect of the rule for small as well as for large estates. In fact the régime of the Code has led in a tremendous degree to a split up of agricultural real estate, which for technical reasons lends itself more readily to a splitting process than does urban realty. Especially noticeable is the preponderance of diminutive lots in the western sections of Germany, which during the 19th century were under the rule of the French Code. Apparently the disposable portion is too small under French law.

The incidents of the legitime rule differ widely among the various civil law countries. Some major points may briefly be indicated. Compulsory heirs are the descendants, including grand-children and great grand-children; and ascendants in case there are no descendants. Brothers and sisters are not entitled to a legitime, save in some minor territories. Illegitimate children are compulsory heirs of their mother; under the law of France and in some other countries of their father also, if acknowledged by him. Wife and husband are not in the same category as the children. They are frequently protected by marital law and by marriage settlements. Particularly if there is a community property between the spouses will the surviving one get one half of the common property by strength of his or her co-ownership. However, there may be a legitime too. This is true, e. g., under German law, where the intestate share of the spouse, if there are offspring, amounts at most to a quarter, therefore the legitime at most to one-eighth.

Technically, the compulsory heir may be considered a real heir, hence the owner or co-owner of the estate; or as a creditor of the testamentary heir, for a sum equivalent to the value of the estate withdrawn from him by the will. As to the first alternative, it must be mentioned that under civil law the heir becomes the owner of the estate automatically on the death of the deceased. On deciding between the dual solutions, it seems natural to have the compulsory heir enjoy the same privileges as have intestate and testamentary heirs, hence to grant to him a property interest in the estate. This is the majority rule. German and Austrian law, however, have adopted the contrary solution, transforming the legitime into a debt. The ownership rule was held unsatisfactory because ownership would be uncertain so long as the compulsory heir, during the time provided by law, has not yet decided whether or not to exercise his right. Again, if he decides in the affirmative then the theory will operate under which he is regarded as owner since the death of the deceased. This results in a retroactive effect, jeopardizing former transactions of the testamentary heir. Finally the compulsory heir, who obtains a part of the estate, is likely to be an unpleasant partner.

Perhaps the most serious objection against the legitime rule consists in the fact that it inevitably entails restrictions upon the freedom of the owner to dispose of his property inter vivos. Gifts which would impair the legitime must be voidable lest the legitime be destroyed. However the law clearly dislikes binding the owner too tightly. It is seeking a more or less medium ground, e. g., by validating the voidable gift after the lapse of a certain time (ten years in German law).

Of course there are situations where the right to the legitime ceases. A conception common to the various civil law systems is the one of "unworthiness of inheritance" which takes away all rights in the estate, even contrary to the will, —though this is true only in very grave cases, e. g., where the heir has intentionally caused the death of the deceased. In addition many

4. Lujo von Brentano Erbrechtspolitik (1899) p. 23.

civil law systems, among them the German, but not the French, set out specific reasons entitling the testator to disinherit a compulsory heir upon express reference to the reason availed of. Dishonorable conduct opposed by the deceased would be sufficient. In case of litigation the existence of grounds for disinheritance has to be proved by the testamentary heir.

Apart from the legitime and its substitutes, liberty of testation may be suppressed or curtailed by devices of an entirely different sociological character. Under the feudal system there is no testation at all, the estate in feud being transmitted from generation to generation by strength of rules aimed at maintaining the family's splendor and power. The system was in force, as to considerable parts of the large property holdings within the three continental empires until their breakdown caused by the World War. The socialist solution of the inheritance problem is related to the democratic one inasmuch as it envisages the interest of the broad mass rather than the privilege of a small group. On the other hand it has in common with the feudal rule the thoroughgoing subordination of the property owner to the sway of an overlord, and the State is a much more exacting overlord than the family. Under the Russian Code of 1927 only descendants among whom the testator may make a choice by will, can be heirs; insofar as there are no descendants or as they are disinherited, the estate inures to the government. However descendants up to eighteen years are entitled to a legitime amounting to three quarters of their intestate share. Resting on a different philosophy, but comparable as to the point here in question is the German Hereditary Farm Law of 1933 which extends to all farms of a medium size, constituting the bulk of the country's agricultural land. Under this law the peasant can sell or mortgage the farm but only with consent of the authorities who may even deprive him of the farm for dishonest conduct or or failure of management. It is in the spirit of these restrictions that the State imposes upon the peasant the rule of succession: one male kin, ordinarily the youngest one will be the compulsory successor to the farm; save for a very limited right of the peasant to make a choice among certain male kin. The present Italian legislature seems not to have touched yet upon the inheritance law which was designed after the French model.

Particularly interesting is the Mexican legislation. Under the Civil Code of 1884, the legitime was reduced to a maintenance claim of the nearest relatives, descendants up to an age of twenty-five years being ordinarily entitled to it. This was possibly due to the influence of American legal thought. But it may be worthwhile to mention that Hugo Grotius the famous founder of the postmedieval natural-right theory (1645) had already advocated reduction of the legitime to a maintenance right.

Under the Mexican "New Civil Code" [Nuevo Código Civil] of 1932 the maintenance theory still dominates. Yet the picture has changed considerably. While the maintenance right of descendants expires at twenty-one years of age, save indeed for some wide exceptions, it has been extended to the concubine of the testator provided he had lived with her "as if married" for at least five years preceding his death, or had had children by her; and to all collateral relatives up to the fourth degree. The allowance of maintenance claims to members of these (and other) groups is conditioned upon incapacity to work. The protection afforded the concubine seems to suggest the influence of Russian law which assimilates concubinage to marriage, as does the reduction in age limits. The surprising extension of the claim to relatives up to the fourth degree may be explained by a desire to relieve the government of public charge cases.

The question arises whether the common law countries will in the long run continue to maintain unrestricted liberty of testation. There are distinct symptoms to the contrary within the English empire. The counter-movement started from New Zealand, a laboratory of experimentation in social law.[5] During the first decade of this century statutes were enacted under which the Court, in its discretion, may provide out of the estate for proper maintenance of surviving spouse or children in case the deceased has not done so by will; and the Court may also, according to the circumstances of the case, grant periodical payments or a lump sum. Similar statutes have subsequently been passed by other Australian States and by some of the Canadian provinces. The movement has even spread to the mother country. Since 1929 several bills, more or less influenced by the New Zealand model, were introduced in Parliament, but did not result in a legislative act; a compromise bill was rejected by Parliament in 1934.[6] Nevertheless the fact of these Parliamentary considerations including the hearings of a special Select Committee of both houses of Parliament, is noticeable. In fact, the New Zealand device, adopted by the compromise bill, practically giving to the discretion of the Court a power of supplementing the will naturally aroused grave objections. A bill meeting these objections may be found acceptable some time in the future.

As to the United States there has not yet appeared a similar distinct and general counteraction against liberty of testation. But there are indications of a slow, almost unconscious change in the mind of the community. To be sure, exemption of homesteads, by state legislation, from testamentary power—a fact sometimes alleged in this connection—is hardly of any general significance. Notable, however, is the New York law, under which a testator may give no more than half of his estate for charitable purposes if he is survived by descendants, ascendants or his spouse. This law gives the latter persons a preferencce which has, in one important respect, the effect of the legitime. The rule tends even to expand in scope. Indeed, it would be the better policy to discriminate against private persons outside the family group than against charitable institutions. More consistently, a Norwegian law of 1918, in leaving only a quarter of the estate to the free disposal of a testator with issue, contrariwise permits, in the case of large estates (above one million Kroner), an encroachment upon the legitime by charitable legacies. Finally the recent substitutions of a non-barrable, "statutory portion" for dower and curtesy constitute the introduction of a legitime and of the Latin co-owner type. Here again we may expect the last phase of evolution has hardly been reached. A certain preference for the spouse over the children might be in harmony with prevailing human sentiment, as appears from the great majority of wills. Yet the contrast between the amplitude of the spouse's protection on the one hand and the entire

5. Kennedy Testators Dependents Relief Legislation, 20 Iowa L. R. 316 (1935).

6. Gower and Keeton Freedom of Testation in English Law 20 Iowa L. R. 326 (1935).

absence of the children's protection on the other hand may be regarded as unsatisfactory in the long run. Thus from various sources pressure is going to be brought upon the time-honoured Anglo-American system for the institution of something like a legitime. Such an evolution might be considered as a weakening of the pioneer spirit. This process, however, seems to be inevitable due to the fact that the territorial prerequisites of American pioneering no longer exist. Rugged individualism probably is doomed. The fight for the maintenance of familial property will have to be conducted upon different fronts.

FEDERAL ADMINISTRATIVE LAW

Fundamental Theories Underlying Draft of Measure Providing for a United States Administrative Court Introduced during the Last Session of Congress and Known as the Logan Bill —Functional Segregation—Judicial Independence—A Liberal Judicial Review—Report of Federal Bar Association Committee on Subject

BY ROBERT M. COOPER
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THE last half century has witnessed a constant growth of governmental services and functions in both national and local spheres of control. Due to the changing needs of our economic society, the desire for speedy, efficient and inexpensive settlement of controversies and the urgent need for technical experts, the responsibility of performing these new functions resulted in an enormous increase in the proportions of our administrative government. Under the stress of the recent economic crisis, a further growth of administrative activity became unavoidable and with it came new problems of governmental organization. After a thorough study and investigation of this new growth in federal administrative functions, the Special Committee on Administrative Law of the American Bar Association participated in the drafting of legislation providing for the establishment of a United States Administrative Court which had for its purpose the elimination of certain defects said to exist in the present system of administrative justice. This legislation was introduced in both the House and Senate during the last session of Congress and subsequently became identified as the Logan bill. The substantive provisions of this bill have already been discussed at great length in previous issues of the JOURNAL and no useful purpose would be served by performing that task again.

Recently the Committee on Administrative Law of the Federal Bar Association under the chairmanship of John Dickinson, after a thorough study of the Logan bill condemned the legislation as undesirable and unfeasable in many of its important aspects. It is the purpose of this article to set forth the conclusions and findings of that Committee with regard to the proposed legislation. But before considering the report of the Committee it would seem advisable to also examine the underlying theories of the drafters and sponsors of the bill which formed the basis of their desire to correct alleged evils in the functional operation of federal administration. These fundamental theories relate to three distinct aspects of our present system of governmental administration, each of which will be examined separately in an effort to evaluate the merits of this or other similar legislation purporting to correct the "evils" of administrative justice.

Functional Segregation

The first theory accepted by the advocates of the Logan bill is embodied in the assumption that the quasi-judicial functions of administrative tribunals should be segregated from the other duties which are performed by these agencies and placed in a separate tribunal. From a practical standpoint, it should be recognized that the process of administration is one which can only be viewed as a whole and its various functions are not susceptible of independent classification in accordance with a few generalized characteristics. But apart from this difficulty, there are substantial considerations of administrative policy which militate against the adoption of any proposal for the wholesale segregation of certain administrative functions. The process of administration assumes the form of either administrative legislation or adjudication and frequently both in the case of the more prolonged procedures. Although these functions are frequently identified by distinguishing characteristics, they are in a large measure integral and dependent parts of the same administrative process mutually interwoven by the practical necessity of preserving administrative autonomy. The proposal to segregate administrative adjudication by vesting this function in an independent tribunal having no relation to the previous administrative process would not only greatly impair the efficiency and speed of governmental administration, but would tend to disrupt the entire administrative process during its later stages. This would be particularly true if the duties of adjudication were placed in a court such as provided for in the Logan bill. The technical knowledge of the specialized expert in the formulation of social or economic policies and the legitimate exercise of administrative discretion are as much a part of administrative adjudication as they are of the legislative or executive functions of administration. The

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considerations of administrative policy which have suggested the creation of administrative tribunals for the exercise of the duties of functional administration pertain to the administrative process as a whole, including those functions which may be termed quasi-judicial. The manifold advantages attained by maintaining the autonomy and integrity of the administrative process in all of its aspects should not be sacrificed by the adoption of any proposal which endangers the efficient operation of governmental administration.

As a corollary to the judicial segregation theory the sponsors of the Logan bill object to the frequency in which the prosecutor-judge combination occurs in our administrative agencies. It is pointed out that in many instances the same administrative authority drafts and issues the general regulations, then investigates alleged infractions of these rules and finally prosecutes private parties for violations discovered by such investigation. It is contended that such a combination of duties tends to create an attitude of prejudice or bias in the mind of administrative officials employed in the ultimate determination of administrative controversies. From a judicial standpoint, the federal courts have never condemned this commingling of duties and, in many instances, have given their tacit approval to such a combination of powers. In *Brinkley* v. *Hassig*, 83 F. (2d) 351 (1936), the court observed that although "the spectacle of an administrative tribunal acting as both prosecutor and judge has been subject of much comment, . . . it has never been held that such a procedure denies constitutional right." It should be noted that the evils of the prosecutor-judge combination are strictly applicable only to proceedings of a penal character, while the great majority of administrative controversies are civil proceedings which merely serve as a warning to private litigants. Furthermore, it is not altogether clear why an administrator should develop a personal interest amounting to partiality or bias in a controversy solely because that same person participated in the original investigation. In any event it seems manifestly unwise to accept this wholesale charge of personal prejudice as a basis for a new system of administrative organization without a further study of these fundamental assumptions. Finally, it seems quite clear that as a practical matter this attitude of partiality or bias, if it exists at all, could only be developed in the one-man or more compact administrative authorities. In the case of the larger and more seasoned agencies division of labor and function between various units within the internal organization tends to eliminate the spread of personal interest to the ultimate authority rendering the decision. The typical administrative tribunal partitions its duties between an investigation unit, and administrative unit and a legal division, thereby tending to isolate the superior authority from the original proceedings.

Judicial Independence

The second principal theory advanced by the advocates of the Logan bill relates to the necessity for maintaining judicial independence by freeing the judiciary from executive or legislative control. It is suggested that this independence can be substantially achieved by protecting the judiciary against diminution of compensation and insecurity of tenure. In so far as this theory is applied to essentially judicial tribunals exercising strictly judicial duties there can be no question as to its desirability. On the other hand, the application of these theories to administrative officers performing the functions of adjudication is open to serious question. This is particularly true with respect to the proposal for an unlimited security of tenure. In the formulation and development of administrative policy and the exercise of functional discretion —both of which are embodied in administrative determinations—administrative officials should be made responsible to an ultimate controlling authority. The impropriety of provisions guaranteeing an absolute security of tenure in the case of administrators developing definitely unsympathetic attitudes towards the established policy or aims of the incumbent administration is readily apparent. The presence of hostile administrators entrenched in key positions within the administrative organization has not infrequently contributed to the lack of progressive development in the growth of governmental policies. However, it should be recognized that it would be clearly unwise to substitute limited tenure provisions as a primary means of supervisory control in place of the more direct and effective methods of administrative supervision. Fear of removal from office should only be used as a means of supervision in the most extreme cases. In the establishment of administrative authorities great care should be exercised in the selection of tenure alternatives in order to avoid the evils of a constantly changing political administration and the dangers of a firmly entrenched administrative bureaucracy.

A Liberal Judicial Review

The final theory upon which the sponsors of the bill rest their demand for an administrative court relates to the establishment of a broader and more comprehensive review of the decisions of administrative agencies. It is contended that the present scope of judicial review, which is limited solely to questions of law, is inadequate and should be enlarged to include questions of fact as well as of law. Two assumptions are embodied in this liberal review theory which are open to wide speculation. In the first place the theory assumes that there are certain true findings of fact which are ascertainable in any administrative controversy and that any other findings would be erroneous. This assumption of the existence of facts in the absolute is clearly fallacious. The validity of administrative action should and must depend upon the facts as found by the agency created for that purpose in a regularly conducted proceeding. The absolute existence of these or other facts in reality has no bearing on the validity of the administrative action provided there were no substantial irregularities in the administrative proceedings. Unless there is accorded a finality to the findings of fact at some stage in a proceeding —regardless of their existence in reality—the process of determination and redetermination would never cease.

At this point the second assumption of the sponsors of the bill becomes evident. It is argued that an independent tribunal endowed with many of the traditional attributes of judicial power and completely segregated from the former administrative process is the most suitable agency in which to vest the authority to determine the existence of all facts relating to the administrative controversy. No adequate reason has ever been advanced to explain why judges as such are more likely to reach correct fact determinations than are experienced administrators. It is hardly reasonable to assume that judicial officers completely untrained in the problems of public administration are more cap-

able or more likely to reach proper results than experienced officials thoroughly familiar with the intricacies of modern government and the techniques of functional administration. It is noteworthy that in the past the limitations on the scope of judicial review were for the most part self-imposed ones based upon a frank recognition of the judicial inability to effectively supervise factual administrative decisions. With respect to a judicial review of fact determinations involving the exercise of discretion or the development of administrative policy this argument is even more cogent. The considerations of sound policy which were advanced against the theory of a judicial segregation of functions are similarly applicable to the review of these purely administrative decisions.

The preceding discussion should not be interpreted as advocating the complete freedom of administrative action from judicial restraint. On the contrary it must be recognized that some measure of judicial control is necessary to prevent unlawful or arbitrary interference with private rights. However, the urgency of this need should neither obscure the fundamental limitations which adhere in our judicial institutions nor destroy the advantages to be derived from a reasonably autonomous system of administrative justice. The need of a formula to accurately define the areas of administrative immunity and judicial superiority is one of the most pressing problems with which government is faced today. But the liberal review theory does not satisfy this need since it places its entire emphasis on safeguards and ignores the resultant paralysis of functional administration.

Coming now to the substantive features of the proposed legislation, the following is the report of the Committee on Administrative Law of the Federal Bar Association:

Principal Features of the Legislation

The jurisdiction of the proposed court under the Logan Bill will include the following: (1) The Jurisdiction now vested in the Court of Customs and Patent Appeals, the Court of Claims, the Customs Court and the Board of Tax Appeals; (2) The jurisdiction of the United States District Courts over actions against Collectors of Internal Revenue for the recovery of taxes and over suits to enjoin the collection of taxes; (3) The jurisdiction of the District Court of the United States for the District of Columbia in proceedings of extraordinary processes against officers and employes of the United States; (4) Jurisdiction to review the action of any governmental agency for refusing to admit any person to practice before it or disbarment from practice; and (5) The exclusive jurisdiction now vested in any governmental agencies over the revocation of licenses, permits, registrations or other grants for regulatory purposes. The court shall consist of a trial division and of an appellate division, each divided into appropriate sections. Three stages of procedure are provided for. The trial division will try the facts in any proceeding. Appeal may then be had to the appellate division which has jurisdiction to review all matters appearing on the record, including both questions of law and questions of fact, and may also in its discretion permit or direct the taking of additional evidence. In other words, the appellate division may in all cases grant a trial *de novo.* A further appeal is possible from the decision of the appellate division to the appellate division sitting *en banc,* its jurisdiction being limited to questions of law. The decision of the appellate division sitting *en banc* is subject to review only by the Supreme Court upon a petition for a writ of certiorari.

The first thing that is noticed in the jurisdictional provisions of the proposed legislation is the marked tendency to confer a variegated type of jurisdiction on the new court which has little, if any, relation to the purposes expressed by the drafters of the bill. In the main, the bill invests the administrative court with jurisdiction which is now exercised by legislative courts, constitutional courts, and a few administrative agencies. The advisability and feasibility of vesting the court with the jurisdiction now exercised by legislative courts or constitutional courts is not covered by any rationale advanced by the drafters. The theories which they have advanced relate only to the segregation of quasi-judicial functions from the previous administrative process and the broadening of the scope of judicial review of such determinations. The second outstanding feature of the provisions of the Logan Bill arises from the attempt to vest the court with a heterogenous classification of disputes which bear little relation to the ability and knowledge of those serving in the capacity of judges on the proposed tribunal. The classification which the drafters have in mind is concerned with controversies between the Government and private citizens. This, it will be recognized, is a decided drift in the direction of adopting a system similar to the Continental *Droit Administratif.* It is not within the province of this report to evaluate the merits or demerits of this system, but before taking such a step it seems advisable that extreme caution should be exercised in the formulation of a policy which might conceivably lead to the adoption of such a totally foreign administrative structure.

With regard to the procedure in the new court, it would appear that efficiency in the dispatch of government business is being sacrificed. It is difficult to understand why there should be two stages in the procedure which provide for a trial *de novo.* Certainly, it must be presumed that the trial division will consist of judges of precisely the same qualifications as those serving on the appellate division. Consequently, there seems to be little justification for providing a litigant with two completely new trials in order to protect his rights. But whether such a protection is deemed necessary or not, it seems quite evident that such a procedure would result in considerable delay and seriously interfere with the functioning of governmental operations.

Apart from these general considerations, the following observations are pertinent with regard to the jurisdictional provisions of the Logan Bill:

Jurisdiction Now Vested in Legislative Courts and the Board of Tax Appeals

In so far as this jurisdiction is concerned the new court will offer very little, if any, particular advantage since the ultimate result will amount to little more than a change of name. The judges of these tribunals will serve in a similar capacity on the new court in the appropriate section. However, the change in procedure which the bill proposes gives rise to serious disadvantages which should not be ignored. On the whole, the administration of claims and customs matters at present appear to be functioning with unusual success and any such radical change as that embodied in the present bill should be given careful and thoughtful consideration. The same observation may be made

with respect to the Board of Tax Appeals. The consolidation of these tribunals would neither add to the efficiency of their functions nor contribute materially to their speed in administration.

Jurisdiction of District Courts Over Tax Matters

The vesting of this jurisdiction in the new court is certainly open to serious question. In the first place, the proposal can not be justified by reference to any existing theory of administrative justice. The proposal amounts to a transfer from constitutional courts surrounded by the protection of the Constitution to a legislative court completely under the domination of Congress.[1] There is a certain advantage to be obtained by the centralization of jurisdiction for tax controversies, but this should be accomplished under the jurisdiction of existing tribunals rather than through the creation of new uninformed agencies. In so far as this jurisdiction attempts to cut off existing remedies in presently established constitutional courts, the bill is open to serious doubts as to constitutionality. Furthermore, if this jurisdiction be construed as an exercise of the judicial power of Art. III, it would similarly be invalid by reference to the separation doctrine. In the second place, the desirability of vesting traditional judicial remedies in a legislative tribunal is extremely doubtful from either a judicial or an administrative standpoint.

The Jurisdiction of the Courts of the District of Columbia in Proceedings by Extraordinary Process Against Officers and Employees of the United States

This provision is subject to the same constitutional objection which was indicated in the case of tax controversies. In substance, it amounts to the divesting of a constitutional court of its jurisdiction in order to place that same remedy in a legislative tribunal. The judges who are now handling these controversies are as well informed and expert in matters pertaining to governmental administration as the members of the new court could possibly be. Due to the fact that the heads of the executive departments reside in Washington where only, therefore, they are subject to judicial process, the Justices of the District Court of the United States and the United States Court of Appeals for the District of Columbia have had more experience in such matters than any other judicial officers. It is probably to the public advantage to have these important controversies testing the statutory and constitutional powers of executive officers of the Government heard not by judges of limited and specialized jurisdiction, but by judges who have a wide experience in both public and private law, as is the case with the present Justices. It has been suggested that the courts of the District of Columbia are inexperienced in these matters, and that the controversies which they handle relate to divorce proceedings and other administrative tasks. Quite the contrary is true. Between 50 and 60% of the cases numerically heard in the United States Court of Appeals for the District of Columbia during the past several years have been federal cases, and a substantial number involved questions of great national importance. About 70% of the time of that court has been occupied with such cases. Although the proportion is considerably less for the District Court of the United States for the District of Columbia, its federal cases are very substantial in number and the time involved in their consideration is not insubstantial. The jurisdiction of these controversies is now centralized. The courts perform their duties expeditiously and there would seem to be little reason for transferring jurisdiction to another body. In any event, the drafters of the bill have suggested no theory which could form the basis for such a proposed transfer.

Jurisdiction to Review the Action of Any Agency for Refusing to Admit Any Person to Practice Before It

This type of jurisdiction seems to be a particularly unfortunate encroachment upon the prerogatives of administrative tribunals. In general, issues involving the right to practice before administrative agencies or disbarment proceedings seems to be definitely out of place when vested in a tribunal established for the purpose of performing judicial functions. It seems quite evident that the administrative agencies themselves should have the original authority to determine the qualifications and ability of those desiring to practice before them. Such requirements are made on the basis of specialized knowledge and technical ability to represent clients who are involved in controversies with the agency in question. It has been found necessary to stipulate these requirements in order to insure a proper presentation of each case before the administrative authority. In this view of the matter it seems reasonable to assume that proceedings which relate to refusals to permit a person to practice before an administrative agency, which involve substantially the same questions of policy, should likewise remain in the administrative authority, free from the control of an agency inexperienced in such administrative problems. In other words, the authority establishing the qualifications and requirements should likewise be the agency to determine whether these requirements are met by the individual in question. In any event, it seems obviously unwise to attempt to subject these tribunals to uniform rules and qualifications with respect to the persons appearing before them, and it might be said that this is even true in the case of the procedure involving revocation of the right to practice. As a practical matter, these proceedings are essentially administrative matters in both form and substance and seldom involve questions which even relate to a judicial issue. This, of course, is not completely accurate with regard to procedure in disbarment controversies. However, as to the sufficiency of this procedure, a right of appeal has always existed to the courts of the District of Columbia and hence to the United States Supreme Court in cases where the rights of the complainant have been substantially infringed by inadequate proceedings.

The Jurisdiction Now Vested in Governmental Agencies Over the Revocation or Suspension of Licenses, Permits, Registrations, or Other Grants for Regulatory Purposes

The transfer of the powers of the various governmental agencies to revoke licenses seems definitely unwise. The proposed court would be given a vast jurisdiction over many miscellaneous and varied matters, each of which is now handled by the administrative agency expert in the subject and thoroughly accus-

1. Space does not permit a discussion of the constitutional problems raised by this and other provisions of the Logan bill which in effect attempt to vest the judicial power of Article III in a legislative court. The author has attempted to consider these problems in a recent legal periodical to which the reader is referred. See Cooper, "The Proposed United States Administrative Court," 35 Michigan Law Review, Page 193 (1936).

tomed to dealing with the problems of administration in that respect. The reason for the growth of administrative powers has been the necessity for the handling of these problems by persons of specialized skill and knowledge. As the problems of public administration become more complex, the necessity for at least initial expert or technical determination becomes all the greater. License revocation proceedings are as much an administrative matter as the initial granting of the license and there does not seem to be any sufficient tangible reason to transfer the former process to a judicial tribunal thoroughly unfamiliar with the general policy and discretion of the administrative process. Furthermore, it would seem that in many instances the denial of the right of the administrative agency to itself revoke a license and to require it to bring and succeed in a suit in the administrative court in order to do so may, because of the lapse of time involved, result in great public harm. Many of these revocation proceedings are emergency matters and must be dealt with the moment grounds for revocation are discovered. The Logan Bill provides that licenses may be suspended during the period of litigation, but it is submitted that this is not sufficient assurance that public harm may be prevented by summary processes. An attempt to segregate a portion of the administrative process by vesting it in an independent tribunal appears to be a serious departure from administrative efficiency. In view of the necessity for handling all these various problems of licensing by persons of specialized knowledge, and in view of the fact previously referred to that as the problems of government have become more complex the necessity for initial expert determination becomes greater, it seems particularly unwise to attempt to reverse the practice at this late hour and to further attempt to consolidate so many diverse and variegated administrative duties into one agency. It should not be forgotten that if there is arbitrary action in the revocation of these licenses, private litigants are entitled to attack the order by injunction proceedings in the courts of the District of Columbia.

Conclusion

Although fully aware of the need for reform in the organization and functional operation of the present system of administrative justice, your Committee on Administrative Law is of the opinion that the Logan Bill would not accomplish any substantial improvement in these respects. It is recommended that this Committee continue to study the problems raised by this or other similar legislation and report its conclusions to the Executive Council from time to time.

Your Committee has not prepared the detailed report which was its original intention due to assurances that the Logan Bill is no longer receiving active support. Col. O. R. McGuire, Chairman of the Special Committee on Administrative Law of the American Bar Association and Vice-Chairman of this Committee, has informed this Committee that the American Bar Association's Committee will no longer support this bill. Col. McGuire further indicated that the Logan Bill would not be considered by the American Bar Association at its Columbus meeting, that the bill would not be introduced in the Senate at its coming session, and that it would not receive the support of the American Bar Association if it is introduced in the House of Representatives.

It is further recommended that your Committee cooperate with the Special Committee on Administrative Law of the American Bar Association in its attempt to draft a new bill which will more satisfactorily and completely accomplish the removal of existing defects in the present system of administration.[2]

The foregoing analysis of the drafters' theories regarding the control of administrative action reveals what seems to be a fundamental dislike for administrative activity. It is unfortunate, but nevertheless true, that much of this hostility toward administration is born of a deep-seated dislike for governmental interference with private initiative rather than of a fear of unauthorized action by governmental officials. This observation is not without serious political consequences which must be faced in attempting to reorganize our administrative structure. The tendency today is to rely more and more on government for the alleviation of economic maladjustments. Suffice is it to say that the future of our democratic institutions may in no small measure depend upon the ability of popular government to accept a responsible administrative organization within its political framework.

PROGRAM OF PUBLIC MEETING OF COMMITTEE ON FEDERAL TAXATION

All sessions on Saturday, March 20, 1937, at the Hotel Willard, Washington, D. C.

1. 12:45—Luncheon:

Address by the guest of honor, HON. MORRISON SHAFROTH, Chief Counsel, Bureau of Internal Revenue.

Response by HON. BENJAMIN H. LITTLETON, Judge, Court of Claims; formerly Chairman of the Board of Tax Appeals.

2. 2:30—Afternoon Session:

HON. ROBERT L. DOUGHTON, Chairman of the Committee on Ways and Means, House of Representatives: "The Work of the Ways and Means Committee."

HON. EUGENE BLACK, Chairman of the United States Board of Tax Appeals: "The Work of the Board."

HON. WILLIAM A. SCHNADER, formerly Attorney General of Pennsylvania: "Inheritance Taxation: Procedural Problems Where More Than One State Claims to Have Been the Domicile of Decedent."

Open-forum Discussion.

3. 8:00—Evening Session:

HON. ROBERT M. LA FOLLETTE, United States Senator: "Broadening the Income Tax Base."

HON. JAMES W. MORRIS, Assistant Attorney General: "The Work of the Tax Division of the Department of Justice."

RANDOLPH E. PAUL, Esq., co-author of Paul & Mertens, *Law of Federal Income Taxation:* "Res Adjudicata in Federal Taxation."

Open-forum Discussion.

Light refreshments at the close of this meeting.

The addresses of the speakers listed above will not be longer than fifteen minutes; addresses from the floor will be limited to five minutes. All acceptances by officials are of necessity subject to the superior claim of Government business. Ladies will be welcome at the luncheon and at both of the other sessions.

To enroll as a member of the Clinic, to send suggestions for the Committee's use, to order luncheon tickets ($1.50 each) or to get further information, address

ROBERT N. MILLER, Chairman,
920 Southern Building,
Washington, D. C.

2. The Report was signed by John Dickinson, Chairman, and Guilford Jameson, Albert H. Cotton and Robert M. Cooper. Col. O. R. McGuire, Vice-Chairman of the Committee, concurred in the conclusions reached by the majority of the Committee but felt that a detailed discussion of the bill was academic since it was no longer receiving the active support of the American Bar Association.

THE LAW OF AESTHETICS

Extent to Which Courts Have Gone to Uphold What Are Really Aesthetic Regulations by Finding Authority for Them under the Police Power—Is It Not Time to Give Beauty Protection in Her Own Right without Compelling Her to Resort to the Ambiguous Shelter of Other Governmental Powers?

By Vance G. Ingalls
Assistant Corporation Counsel for City of Detroit

THE day is not far distant when courts will generally recognize as one of the essential powers of government the authority to legislate in the interests of civic beauty. McQuillin in his "Law of Municipal Corporations" has said:

Much of the municipal legislation and regulation of late years, particularly during the past two or three decades, has been induced largely by aesthetic or artistic considerations, and this desire to render the urban centers more attractive has found a firm lodgment in the popular mind. It is destined to increase with the years, and in the development of the law in this respect courts will incline more and more to give a broader interpretation to such regulations, and finally sanction restrictions imposed solely to advance material attractiveness and artistic beauty." (Vol. 3, McQuillin, Municipal Corporations, Sec. 943, page 82.)

However, the same writer points out that at present:

"Restrictions on the use of property under the police power for purely artistic or aesthetic purposes, in view of the law so far developed, are regarded as invasions of private property rights. But the fact that an ordinance regulating bill-boards, or the height of buildings, for example, has aesthetic considerations in view will not invalidate it if it rests upon the substantial ground of a reasonable police regulation. . . The prevailing legal view has been tersely expressed in a New Jersey case: 'Aesthetic considerations are a matter of luxury and indulgence rather than of necessity, and it is necessity alone which justifies the exercise of the police power to take private property without compensation.'"

Many State courts and the United States Supreme Court have dodged the aesthetic issue by granting the authority under the police power, cloaking it under such well-recognized powers as provisions for traffic safety, prevention of immorality, safety protection, and other common powers of government. Invariably the real reason for such legislation has been the improvement of the appearance of a highway, the neighborhood of parks and boulevards, or the residential sections of cities.

The Harvard Law Review, Vol. 46, page 148, commenting on the case of Perlmutter vs. Green, 259 N. Y. 157, 182 N.E. 5, said:

"Although the present court is not prepared to rest its decision on purely aesthetic grounds, the care with which the question is left open, may indicate that legislation frankly aimed at preserving beauty of the highway will not always be beyond the pale of due process."

In that case it appears that the New York Highway Department having just constructed a new and beautiful highway was greatly perturbed over the placing of a billboard on private property adjoining a portion of the highway which afforded a beautiful view of the countryside. Not having any lawful method of forcing the removal of the billboard, the Department constructed a screen in front of it on public property, thereby cutting off the view of the billboard and entirely destroying its usefulness. The plaintiff in the case, the owner of the billboard, attempted to obtain a mandatory injunction to compel the Highway Department to remove the screen. It was clearly the purpose of the Highway Department in erecting the screen to force the removal of the billboard for aesthetic reasons, but the New York court based its decision in denying the injunction on the theory that the advertising on the billboard would distract motorists' attention and was therefore a traffic hazard which the New York authorities could prevent. The Court neglected to mention the fact that the beautiful view would also distract the drivers' attention. The court said:

"If the attention of the motorist is attracted to the sign, it is distracted from the serious business of driving an automobile at a rapid rate of speed along a public highway traveled by other vehicles. If the billboard does not attract attention, it is useless to the advertiser. It is an undeniable traffic hazard. It is a medium utterly inconsistent with any program of highway safety education."

The leading case of Cusack Co. vs. City of Chicago, 242 U. S. 524, 61 Law Ed. 472, upheld the validity of an ordinance of the City of Chicago which provides as follows:

"It shall be unlawful for any person, firm or corporation to erect or construct any billboard or signboard in any block on any public street in which one half of the buildings on both sides of the street are used exclusively for residence purposes without first obtaining the consent in writing of the owners or duly authorized agents of said owners owning a majority of the frontage of the property on both sides of the street in the block in which such billboard or signboard is to be erected, constructed or located."

The United States Supreme Court found the ordinance valid as a reasonable exercise of police power on the following grounds:

"That fires had been started in the accumulation of conbustible material which gathered about such billboards; that offensive and unsanitary accumulations are habitually found about them; and that they afford a convenient concealment and shield for immoral practices, and for loiterers and criminals."

• It is apparent to anyone who has been connected with municipal government and is familiar with the conditions under which ordinances of this kind are passed, that legislation of this kind is enacted almost solely for the benefit of neighboring property owners. When billboards or other structures or businesses are displeasing to the aesthetic sensibilities of a ma-

jority of the property owners in whose neighborhood they attempt to locate, the property owners, if they have no legal protection in the restrictions of their subdivision, almost invariably demand some form of legislation to prevent or prohibit the unsightly structure or business. The result has been the enactment of a great number of so-called "consent" ordinances similar to the one passed upon by the United States Supreme Court in the foregoing case. A great many of these ordinances have naturally been attacked in the courts and counsel for the cities have justified them under the police power, and the United States Supreme Court has sustained such justification even though it is apparent to anyone familiar with such cases that the only true reason for such ordinances is the elimination of unsightly businesses or structures; fundamentally they are aesthetic regulations.

The United States Supreme Court has even gone so far as to permit the prohibition of unsightly billboards by the method of excessive taxation as in the case of St. Louis Poster Advertising Company vs. St. Louis, 63 Law Ed. 599, where Justice Holmes said:

"If the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether."

Clearly this prohibitive tax was not for revenue (the amount of the tax discouraged the erection of any billboards and therefore defeated such a purpose). The Supreme Court again sanctioned the accomplishment of aesthetic purposes by a subterfuge. Unquestionably Justice Holmes realized the real intent of the law and sympathized with that intent, validating the ordinance under the broad powers of taxation.

In the case of Nebbia vs. New York, 291 U. S. 502, the United States Supreme Court speaking through Justice Roberts, indirectly approved aesthetic legislation in the following language:

"The court has repeatedly sustained curtailment of enjoyment of private property, in the public interest. The owner's rights may be subordinated to the needs of other private owners whose pursuits are vital to the paramount interests of the community. The state may control the use of property in various ways; may prohibit advertising bill boards except of a prescribed size and location, or their use for certain kinds of advertising; may in certain circumstances authorize encroachments by party walls in cities; may fix the height of buildings, the character of materials, and methods of construction, the adjoining area which must be left open, and may exclude from residential sections offensive trades, industries and structures likely injuriously to affect the public health or safety."

In Michigan as far back as the first reported cases, People vs. Carpenter, 1 Mich. 273, legislation in the interests of beauty was recognized at least insofar as it appurtained to public streets. The court there said:

"I think it is fair to conclude that the objects of utility or ornament authorized by the law (permitting certain encroachments over sidewalks, such as balconies, porches, etc.) are such, and such only, as may contribute to the convenience, comfort or health of owners of lots, provided they do not annoy the public or mar the beauty of the city."

An Illinois law prohibiting the erection of any structure to be used for advertising purposes within five hundred feet of a boulevard or park in cities of one hundred thousand population or over was held by the Illinois Supreme Court to have been enacted for aesthetic reasons only, and could not therefore be justified under the police power and was a taking of private property without compensation, contrary to the provisions of the Constitution. This is the case of Haller Sign Works vs. Physical Culture Training School, 34 L.R.A. (N.S.) page 998. The court there said that:

"The courts of this country have with great unanimity held that the police power cannot interfere with private property rights for purely esthetic purposes."

The court further said that:

"The statute in question is an attempt to exercise the police power purely from aesthetic considerations, disassociated entirely from any relation to the public health, morals, comfort, or general welfare. However desirable it may be to encourage an appreciation of the beautiful in art, and to cultivate the taste of the people of the state, still it has never been the theory of our government that such matters could properly be enforced by statute, when not connected with the safety, comfort, health, morals, and material welfare of the people. Advancement along these lines, whether wisely or unwisely, has, so far, been left to the schools and colleges and the influence of social intercourse. The citizen has always been supposed to be free to determine the style of architecture of his house, the color of the paint that he puts thereon, the number and character of trees he will plant, the style and quality of the clothes that he and his family will wear, and it has never been thought that the legislature could invade private rights so far as to prescribe the course to be pursued in these and other like matters, although the highly cultured may find on every street in every town and city many things that are not only open to criticism, but shocking to the aesthetic taste."

The foregoing case cites as authority, cases from New Jersey, Pennsylvania, Massachusetts, New York and Kansas, together with other Illinois cases. The Massachusetts case referred to is that of Welch vs. Swasey, which was taken to the United States Supreme Court and is reported in 214 U.S. 92, 53 L.Ed. 923. In that case the Supreme Court held that the limitation of the height of certain buildings in the City of Boston by ordinance was a reasonable regulation, "even though aesthetic considerations may have entered into the reasons for the passage of such enactment."

The Supreme Court further said that:

"It might well be supposed that taller buildings in the commercial section of the city might be less dangerous in case of fire than in the residential portion. This court is not familiar with the actual facts, but it may be that, in this limited commercial area, the high buildings are generally of fireproof construction; that the fire engines are more numerous and much closer together than in the residential portion, and that an unlimited supply of salt water can be more readily introduced from the harbor into the pipes, and that few women or children are found there in the daytime, and very few people sleep there at night. And there may, in the residential part, be more wooden buildings, the fire apparatus may be more widely scattered, and so situated that it would be more difficult to obtain the necessary amount of water, as the residence quarters are more remote from the water front, and that many women and children spend the day in that section, and the opinion is not strained that an undiscovered fire at night might cause great loss of life in a very high apartment house in that district. These are matters which, it must be presumed, were known by the legislature, and whether or not such were the facts was a question, among others, for the legislature to determine. They are asserted as facts in the brief of the counsel for the city of Boston. If they are, it would seem that ample justification is therein found for the passage of the statutes, and that the plaintiff in error is not entitled to compensation for the reasonable interference with his property rights by the statutes. That, in addition to these sufficient facts, considerations of an aesthetic nature also entered into the reasons for their passage, would not invalidate them."

The main reason cited by the Supreme Court in the foregoing statement as justification for passage of

the ordinance is the possible inadequacy of fire protection facilities in residence neighborhoods. How can an ordinance such as this be justified on that ground, when the obvious solution for such a problem is the provision of more adequate fire protection facilities by the City as the taller buildings and apartments develop the need. Certainly such an ordinance cannot be justified on the grounds of safety, when examples such as the Empire State and other skyscrapers exist in New York. Safety can be and is provided for in the erection of such tall buildings by building codes which require fireproof construction and other safeguards depending on height.

The only real reason for such an ordinance and the one the Supreme Court again avoided in this case is the aesthetic reason. In other words, it is apparent to anyone familiar with such legislation that the City of Boston desired to provide a certain symmetry in building construction throughout the City to improve the appearance of the City, but knowing that such a reason would not be sustained, the authorities argued the other common reasons based on the police power.

The foregoing case is quoted with approval in State vs. Kievman, 165 Atl. page 601. It was there stated:

"It appears from the memorandum of decision that in the trial court the objection made to the statute was 'that it is based solely upon aesthetic considerations and is designed to prevent the establishment of these yards (junk yards) because they constitute an eyesore and are in their nature unsightly.' The situation presented does not require us to decide whether aesthetic considerations alone would be sufficient to warrant regulation or restriction. At most we need go no further than Windsor v. Whitney, supra, 95 Conn. 368, 111 A. 354, 357, 12 A.L.R. 669, in conceding that they 'may be regarded in connection with recognized police power considerations.' If the latter are sufficiently present, the fact that considerations of an aesthetic nature also enter into the reasons for the regulation will not render it invalid. Welch v. Swasey, 214 U. S. 91, 29 S. Ct. 567, 53 L. Ed. 923."

Again the very apparent fact that a law was passed in the interests of aesthetics and that the other reasons given were mere subterfuges either escaped the learned judges or they were sympathetic with such legislation and were only too glad to be able to base their decision on the ancient and honorable police, health and safety grounds and thereby escape the necessity of broadening the conventional conception of police power limitations or the alternative of holding the act invalid.

The Pennsylvania Supreme Court has frankly recognized the need for purely aesthetic legislation, by sustaining the validity of a Pennsylvania statute, which permits cities to establish art juries with authority to approve or disapprove at their discretion all plans for encroachments on the streets, including projecting signs.

In Walnut & Quince Streets Corporation vs. Mills, 154 Atl., page 29, that court said:

"Appellant's point that the power to regulate the type of marquees, being a power to regulate aesthetics not possessed by the Legislature itself, could not be delegated to the art jury, is not well taken, for the state and by delegation the municipality have been for many years universally recognized as having power to regulate aesthetics in public property. The police power is available for the suppression of a nuisance whether offending to hearing, smell, or sight. As said in State ex rel. Civello vs. City of New Orleans, 154 La. 271, 273, 97 So. 440, 444, 33 A.L.R. 260: 'An eye-sore in a neighborhood . . . might be as much a public nuisance, and as ruinous to property values in the neighborhood generally, as a disagreeable noise, or odor, or a menace to safety or health. The difference is not in principle, but only in degree.' It is true that recognition of the power to regulate aesthetics by the state and municipal authorities is of comparatively recent mention in the law books in this country, but it would be an unwarranted repudiation of much that has been accomplished toward the beautification of our towns and cities by state and municipal effort, exercised principally, and rightfully, under the police power, to hold, at this date, that our fundamental law does not permit state and municipal control over aesthetic considerations in the regulation of public property. The function of the art jury which we are considering entirely pertains to public property, and, to the extent that vested property rights are not affected by its exercise of supervisory power, the police power need not be involved. In the present case, the action of the art jury in no way affected appellant's private property rights. As said by McQuillin on Municipal Corporations, (2d Ed.) vol. 4, Sec. 1415, p. 65, 'Whatever rights or title the city or town may have over its streets, its powers are those of a trustee for the benefit of a cestui que trust (the public) to be liberally construed for its benefit, strictly construed to its detriment.' We recognize the importance of aesthetic considerations in what private persons may, at the city's pleasure, be allowed to place in her streets. No one would contend that our organic law forbade municipalities to choose the variety or species of trees and plants they may place in their parks. The art jury's function in choosing what may or may not encroach on the streets is likewise in keeping with governmental guardianship of public property for the public welfare."

Of course, what is beautiful or vulgar, is in many instances largely a matter of taste. Very few people would defend on aesthetic grounds, for instance, junk yards, billboards, gasoline stations, and many other forms of industrial structures, yet it has been demonstrated that all of these may be so constructed as to almost or entirely eliminate their unsightly character. Some gasoline stations and signs are artistic and pleasant to the eye, and a junk yard surrounded by a high, good-looking brick wall or fence loses much of its unattractiveness. The problem is one that cannot be solved by reliance on the police power, by prohibition in certain neighborhoods except upon consent of a percentage of the neighboring property owners or by prohibition because of imaginary fire or health or moral dangers, or vague traffic hazards. What is needed is a frank recognition generally by legislative bodies and courts of the necessity for regulation of private and public property for the purpose of promoting or protecting the attractiveness of our cities and countryside.

In some cases, prohibition is necessary, but in most instances the object could be accomplished by requiring the approval of qualified art commissions or juries of all plans for the erection of commercial structures. Isn't it time we admitted that private property rights do not include the right to destroy the value of a neighbor's property or a city's investment by the construction or erection of hideous eye sores? Isn't it time we admitted that there can be and is a field of law which will offer its aid to civic beauty? It has been aptly said that:

"Beauty may not be a queen, but she is not an outcast beyond the pale of protection or respect. She may at least shelter herself under the wings of safety, morality or decency."

Isn't it about time we gave her protection in her own right without forcing her to ambiguous shelter under other governmental powers.

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ELIHU ROOT

No less competent an authority than the present Chief Justice of the United States has given us the clue to the truly great life and career which closed with the death of Elihu Root in New York on February 8. Speaking at a dinner given at the Union League Club in New York to celebrate the eightieth anniversary of Mr. Root's birth, Chief Justice Hughes, then Secretary of State, said:

"The distinctive characteristic of Mr. Root's career has been his building solidly upon principle. Whether in State, National or international constructive effort, he always goes down to bed-rock. His work has not been sensational in method; he has never been moved by unworthy motives or sought a transient popularity at the expense of principle. Hence his work is permanent. He has told us that the secret of the success of the democratic experience must be found in self-restraint and that virtue he has always exemplified. His is the restraint not of excessive caution but of power under control and well directed. In the illustrations of that power, in the strength of his intellect, in his sustained effort, in his moral force, in his devotion to the cause of peace, he has exalted the American name."

Mr. Hughes had been assigned the duty on this occasion, of speaking of Mr. Root's career as a Statesman. But he declared, "it would be impossible to speak of him in that sphere without referring to his attainments as a lawyer. There are lawyers who bind their minds with the technicalities of their profession, tying up their activities with red tape. There are other lawyers who are so fascinated with legal researches and become so burdened with their accumulations of learning that they are too heavily weighted for the civic struggle. But there are a few, unsurpassed in technical skill, who, without abating the zeal of their pursuit of knowledge, ever show the mastery of a mind whose training and information are instruments and not fetters—the fitting instruments for the service of statesmanship which requires discipline as well as vision. Among those few, with a genius for statecraft as distinct as that of the most eminent painter, sculptor or poet for his art, stands Elihu Root."

Mr. Hughes then touched briefly on Mr. Root's noteworthy public career, beginning with his services to his native State in two constitutional conventions. And here he gave a glimpse of the real man—the man whose clear and commanding intellect has tended to obscure his other great qualities in the minds of many. "Mr. Root's intellectuality," said Mr. Hughes, "has led many to mistake his quality. They know little of his volcanic fire. In truth, I think I may say that his is the unquenchable zeal of the reformer held in control by a supreme practical judgment. In the Constitutional Convention of 1915 he flamed forth like a prophet of Israel, and so long as the political history of New York continues to be of interest, his speech to the Convention on invisible government in this State will be regarded as the most intimate, vivid and powerful description of the system which has mocked our boast of representative institutions."

Mr. Hughes then spoke briefly of Mr. Root's great services as Secretary of War, Secretary of State, and in other important positions—all of which are fairly familiar to the public. But his public service did not end with his retirement from office. In fact, his greatest achievement came after that. "If you ask next what I considered the crown of his endeavor," Mr. Hughes said, "I should say it was his skill in cutting through the entanglements which stood in the way of the establishment of a permanent court of international justice. His suggestion as to the method of selecting judges made that court possible, and his successful endeavor in the interest of international peace

through promoting the reign of law will ever enshrine his memory."

Mr. Root's preeminent position at the Bar was generally conceded. As was said by Hon. Clarence J. Shearn, President of the Bar Association of New York, "Elihu Root, by common consent, was the leader of the American Bar. For powers of keen analysis, logic, judgment and intellectual brilliance, he was unsurpassed in his time. His great talents were not reserved for hire; they were given ungrudgingly to the State, to the Nation, and to the advancement of practice and higher standards of the profession." And Mr. Root himself, in his address as President of the American Bar Association in 1916, has set forth the true spirit of the profession—a spirit which his career at the Bar strikingly illustrates: "It is not the spirit of mere controversy, of mere gain, of mere individual success. To the student of the law, there come from Hortensius and Cicero, from Malesherbes and De Seze, and Erskine and Adams, from all the glorious history of the profession of advocacy, great traditions and ethical ideals and lofty conceptions of the honor and dignity of the profession, of courage and loyalty for the maintenance of the law and the liberty that it guards. It is to a Bar inspired by these traditions, imbued with this spirit, not commercialized, not playing a sordid game, not cunning and subtle and technical or seeking unfair advantage . . . that we must look for the effective administration of the law."

It is natural to divide a man's career into different periods, but the man remains the same. No detailed analysis is necessary to show that in his practice of the profession Mr. Root manifested the same qualities of greatness which later were exhibited on the broader national and international stage. There is no sudden transition when a great lawyer takes his State or Nation for his client. In his practice he realizes he is rendering an important public service, and when he is called to serve the public in some special capacity, he is not entering foreign territory or changed into a different man. In fact, Mr. Root was called to be Secretary of War precisely for the reason that he was a great lawyer. Difficult problems had arisen as a result of our war with Spain and a lawyer was needed to solve them. The intellectual brilliance, the thorough mastery of materials, the constructive mind, which served the nation so well then were assuredly those which assured his distinction at the Bar.

The American Bar Association has a special reason to mourn his death and to cherish his memory. He served as its President and for over forty years was a member. Here, as elsewhere, he was a great constructive force, and his part in its best achievements is outstanding and well recognized. In a sense, the present coordination of the Bar is largely due to him. The need for a closer association of the National Bar Association with the State and Local Associations, as a means of making the profession a more effective instrument for the administration of justice, had been realized by many. But he was the moving spirit in the organization of the Conference of Bar Association Delegates, which went as far as was then possible in the direction of coordination, and undoubtedly paved the way for the more complete organization which now exists. His interest in the movement was unabated until the new plan was adopted at Boston. Only last year he wrote a letter, published in the Journal, approving the plan and urging its adoption.

He played a leading part in securing the adoption of higher standards for admission to the Bar at the Annual Meeting in 1921. He had urged this for years, particularly in his address as President of the Association, on the unassailable ground of the public interest. It would not be too much to say that no important proposal in the Association or out of it, for improving the administration of Justice, for upholding the honor and ideals of the profession and making it a better servant of the public weal, has lacked his interest and active support. His powerful aid to the American Law Institute is well known. It promised to furnish the "Ariadne's thread for guidance through the labyrinth of decisions," of which he spoke in his Presidential address in 1916.

"If I were to try to describe my own life," he said in replying to the addresses at the Union League testimonial dinner referred to above, "I should say that I have done what came to my hand to do, as well as I could." A simple statement that illustrates the truth of the saying: "Great men never think themselves great; small men never think themselves small." But no recital of details can do justice to his career. These were the radiations from something central and more significant—a great character, endowed with unusual intellect and really constructive genius, using these gifts sincerely for the public welfare.

REVIEW OF RECENT SUPREME COURT DECISIONS

Power of Appellate Court to Modify an Equity Decree for Benefit of an Appellee Who Has Not Taken Cross Appeal—North Carolina Statute Altering Mortgagee's Remedy Held not to Impair Obligation of Contract, although Passed after Mortgage Was Executed and Delivered—Equitable Relief Where Life Insurance Policy Is Procured by Fraud—Fraudulent Bank Entry under R. S. Section 5209—Right of District Court to Grant Rehearing of Petition for Reorganization under 77B—Change in Remedy for Enforcement of Bank Stockholders' Liability Held Not to Violate Contract Clause, Especially When Statute Contains Reservation of Power to Alter Remedy—Regulation of Production of Natural Gas—Other Cases

By Edgar Bronson Tolman*

Practice and Procedure—Variation of Appellee's Relief in Absence of Cross-Appeal

Where a surety on a contractor's bond has been decreed to be entitled to exoneration, but has been denied alternative relief of specific performance of an agreement with the contractor, and takes no appeal from the decree, the appellate court may not substitute the latter relief for the former.

Morley Construction Co., et al., v. Maryland Casualty Co., 81 Adv. Op. 323; 57 Sup. Ct. Rep. 325.

In this opinion the Court dealt with a question as to the power of an appellate court to modify an equity decree for the benefit of an appellee who has not taken a cross appeal.

The petitioner, Morley Construction Company, had contracted with the United States to construct a veterans' hospital, and gave bond for performance of its contract, and for payment of all bills for material and labor, the respondent, Maryland Casualty Company, signing the bond as surety. As the work progressed the Construction Company needed a loan, and a supplementary agreement was made by it with the Casualty Company, by which the contractor agreed to deposit $5,000 in a certain bank at Buffalo, and to deposit all monies received in payment from the government on the contract, and the surety agreed to deposit in the same account $5,000, and additional monies sufficient to pay certain bills, both parties to have joint control of the account. The contractor went ahead with the work and finished it, and the surety made its first payment of $5,000 as agreed, but refused to advance the additional funds for payment of the bills. When the final government warrant was received it was sent by inadvertence directly to the contractor, although previously warrants had been sent to the bank in Buffalo for deposit in the joint account. The contractor endorsed the warrant and delivered it to the Merchants Bank at Kansas City, one of the petitioners, and directed it to issue a cashier's check for the sum to the contractor's president. The bank delayed action pending the outcome of two suits brought by the surety. One was brought in the District of Columbia where payment of the warrant was enjoined, and the other, the one at bar, was brought by the surety for relief in accordance with its substantive rights. In the latter suit it recited the facts summarized above, and added that there were outstanding unpaid bills for more than $100,000 covered by its bond. It asserted its right to specific performance of the supplementary contract, claiming that the amount of the final payment should be paid into the joint account, and it claimed the right to be exonerated from loss by reason of the unpaid bills and the right to apply the final warrant for that purpose.

The district judge held that the surety's failure to deposit the additional monies disentitled it to a decree for specific performance, but concluded that the contractor was under duty to exonerate the surety from present liabilities. It specifically found that there was no purpose on the part of the contractor to divert the proceeds of the warrant from the uses of the contract. Accordingly, a decree was made adjudging the surety entitled to exoneration, but denying specific performance, and directing that the proceeds of the warrant be placed in a bank designated by the contractor as a special trust fund for payment of the bills in question. The decree permitted the contractor to control the account. An appeal was taken by the contractor, but no cross appeal was taken by the surety. The Circuit Court of Appeals doubted whether exoneration could properly be granted, and it therefore modified the decree by substituting therefor specific performance of the agreement to deposit the money in the joint account. On certiorari the latter decree was reversed by the Supreme Court in an opinion by Mr. Justice Cardozo, with directions to the Circuit Court to pass specifically on the question whether relief in the form of exoneration was proper in the circumstances.

In disposing of this case, Mr. Justice Cardozo recalled the well settled rule that, in the absence of a cross appeal, an appellee may not attack the decree with a view to enlarging his own rights or lessening the rights of his adversary, and added that the case at bar requires the fixing of the limits of the rule more sharply.

The opinion then discusses the two forms of relief herein sought, and the substitution of one for the other made by the Circuit Court, and concludes that such substitution was improper. In this connection the Court said:

"The surety laid claim to relief upon the basis of a contract, and to other relief by force of an equitable doctrine independent of contract. The decree of the District Court rejected the first claim because the contract had been broken, and accepted the second because the breach was then irrelevant. The decree was responsive to the claim that had been accepted, and not to any other. If there was to be specific performance of the contract, the surety, together with the contractor, would control the

*Assisted by James L. Homire.

distribution of the fund, for so the parties had agreed. If there was to be exoneration and nothing more, the contractor or perhaps the court would control the application and the surety would stand aside. . . . Exoneration 'does not entitle the surety to custody or control of the fund.' . . . . The decision of the Court of Appeals puts an end to this nice adjustment of the relief to the law and of the law to the facts as found. A decree appropriate to exoneration is annulled, and one appropriate to specific performance is given in its place. This is to find the facts anew and differently, for the trial judge had held, at least by implication, that the breach by the surety, viewed in the light of all the circumstances, was something more than unsubstantial. It is to find the law anew and differently, for the trial judge had held that a surety chargeable with such a breach was not entitled to a decree upon the footing of the contract. Even more important, it is to give a new measure of relief, for the trial judge had ruled that the fund was not to be held upon the restrictions stated in the contract, but upon different restrictions originating in the conscience of the Chancellor. True, the relief proper to the theory accepted at the trial is almost as favorable from the view-point of the protection of the surety as the one adopted on appeal, though distinctly less burdensome from the viewpoint of the principal. Exoneration is not the same as specific performance, but it is not very different, and may be nearly, if not quite, as good. This is surely not a reason why an appellate court should be at liberty to treat the two as interchangeable. One might as well say that at the instance of a non-appealing plaintiff a judgment for specific performance could be made to take the place of one for the recovery of damages."

The case was argued by Mr. Martin J. O'Donnell for the petitioners, and by Mr. Spencer F. Harris for the respondent.

State Statutes—Alteration of Remedy to Enforce Mortgage

A state statute, providing that the maker of a note or mortgage shall have a defense against a suit brought by the mortgagee for a deficiency judgment, by showing that the mortgagee purchased the property on foreclosure under a statutory power of sale for substantially less than its true value, is valid, notwithstanding that the statute was passed after the mortgage was executed and delivered. Such a statute merely alters the mortgagee's remedy, but does not impair the obligation of the contract.

Richmond Mortgage and Loan Corp. v. Wachovia Bank and Trust Co., et al., 81 Adv. Op. 361; 51 Sup. Ct. Rep. 338.

In this opinion the validity of an act of North Carolina was considered on an appeal wherein the appellant contended that the act violates the contract clause of the federal Constitution. The act provides that when the mortgagee, payee, or other holder of an obligation, secured by lien on real estate or personalty, causes the sale of the property by a trustee under a statutory power of sale, becomes the purchaser for a sum less than the amount of the debt, and then sues for the deficiency, the defendant by way of defense and set-off may show that the property was fairly worth the amount of the debt or that the sum bid was substantially less than the true value of the property, and thus may defeat the claim in whole or in part. The statute was passed in 1933.

In 1928 the appellees borrowed $8,000 from the appellant on promissory notes secured by a deed of trust on real estate. A default occurred and on demand the trustee exercised the power of sale contained in the deed, and one acting for the appellant bought the property for $3,000. After crediting the proceeds of sale on the notes a balance of $4,534.75 remained unpaid, and the appellant sued to recover this deficiency. The appellees pleaded the statute and alleged that the property was fairly worth the amount of the debt. The appellant replied that since the notes and deed were executed prior to the enactment, the statute violated the contract clause of the federal Constitution. The state courts sustained the statute and held for the appellees.

On certiorari the judgment was affirmed by the Supreme Court in an opinion by MR. JUSTICE ROBERTS. He pointed out that the appellant does not deny that the legislation affects only the remedy, and that its contention was that here the existing remedy was so circumscribed as seriously to impair the value of the right; but this contention was rejected. It was pointed out, moreover, that the contract contemplated that the lender might make itself whole out of the security, but not that it should be enriched at the expense of the borrower, or realize more than it would by repayment of the loan with interest, and that to give effect to this, the state provided remedies.

The remedies by foreclosure in equity and by the exercise of a statutory power of sale were then described, and the court pointed out that even if the legislature had abolished the remedy by trustee's sale it could not be said that an adequate remedy was not available for enforcement of the contract, if the remedy of equity foreclosure were left in force. The reasoning in support of this view was stated as follows in the opinion:

"When the loan was made two such remedies were available. The mortgagee could proceed by bill in equity to foreclose the security. If it did the chancellor who controlled the proceeding could set aside a sale if the price bid was inadequate. In addition, he might award a money decree for the amount by which the avails of the sale fell below the amount of the indebtedness, but his decree in that behalf would be governed by well understood principles of equity. An alternative remedy sanctioned by state law was available if the deed of trust so provided. This was the sale of the pledged property by the trustee. If this were the remedy authorized by the contract, and the mortgagee himself became the purchaser at the trustee's sale, he might thereafter, in an action at law, recover the difference between the price he had bid and the amount of the indebtedness. The statute under attack effected certain alterations of this remedy. Sections 1 and 2, not here in issue, provide that if the mortgaged property be sold under power of sale, and the sum bid be inadequate so that consummation of the sale would be inequitable, the mortgagor may apply to the superior court for an order enjoining such consummation, and the judge may direct a resale by a trustee or by a commissioner appointed for the purpose, upon terms he may deem just and equitable. These sections modifying the procedure under a power of sale so as to assimilate it to the procedure in strict foreclosure, have been sustained as constitutional by the State Supreme Court. The section with which we are concerned adds that if the mortgagee becomes the purchaser at the trustee's sale, and afterwards brings an action at law for a deficiency, the jury shall determine the actual amount needed by him to make him whole for his debt by finding the true or fair value of the property at the date of sale, the judgment being for the difference between that value and the amount of the debt remaining unpaid, or, if the value found equals the amount of the debt, for the defendant. The statute has no application if the purchaser at trustee's sale be other than the mortgagee. The act alters and modifies one of the existing remedies for realization of the value of the security, but cannot fairly be said to do more than restrict the mortgagee to that for which he contracted, namely, payment in full. It recognizes the obligation of his contract and his right to its

full enforcement but limits that right so as to prevent his obtaining more than his due. By the old and well known remedy of foreclosure a mortgage was so limited because of the chancellor's control of the proceeding. That proceeding, as has been said, has always been available to the mortgagee in North Carolina. Granting that by the alternative remedy of trustee's sale the mortgagee might perchance obtain something more, or might obtain only that which was his due somewhat more expeditiously, than he could in chancery, it remains that the procedure to foreclose in equity is, and has been, the classical method of realization upon mortgage security and has always been understood to be fair to both parties to the contract and to afford an adequate remedy to the mortgagee. If therefore, the legislature of the State had elected altogether to abolish the remedy by trustee's sale we could not say that it had not left the mortgagee an adequate remedy for the enforcement of his contract. But the legislature has by no means gone so far. The law has merely restricted the exercise of the contractual remedy to provide a procedure which, to some extent, renders the remedy by a trustee's sale consistent with that in equity. This does not impair the obligation of the contract."

The case was argued by Mr. Kester Walton for the appellant, and by Mr. S. G. Bernard for the appellees.

Insurance—Equitable Relief Where Life Insurance Policy Is Procured by Fraud

Although fraud in the procuring of a life insurance policy is a defense to an action at law on the policy, if the action is brought within the period during which the policy is contestable, the insurer is not required to wait until action is brought, but is entitled to equitable relief in a suit for cancellation of the policy, during the period of contestability.

The Am. Life Ins. Co. v. Stewart, et al., 81 Adv. Op. 306; 57 Sup. Ct. Rep. 377.

Two cases were disposed of by this opinion involving the existence of a remedy in equity for the cancellation of life insurance policies, on the ground that they were procured through fraud. Two policies were involved, both containing clauses that they should cease to be contestable after the expiration of a stated time. The petitioner, in February 1932, issued two life insurance policies on the life of one Stewart, each for $5,000, one payable to his son, and the other payable to his wife, respondents respectively in the two cases. The clause as to incontestability provided that the policy should be incontestable (except for non-payment of premium) after a year from the date of its issue, if the insured be then living, and otherwise two years from the date of its issue. On May 1, 1932, three months and eight days after the policies were issued, the insured died, having made in his application fraudulent misstatements as to his health and other matters material to the risk. On September 3, 1932, the insurer brought separate suits in equity for the cancellation of each policy, asserting that the beneficiary might delay commencement of actions at law until after the two-year period had expired, or might begin actions within the period and thereafter dismiss them and begin anew. On September 26, 1932, the defendants moved to dismiss the suits in equity. On October 11, 1932, the beneficiaries commenced actions at law to recover on the policies, and thereafter the insurer supplemented its bills alleging the pendency of the actions at law and seeking an injunction against their prosecution. Later, the motion to dismiss the equity suits was denied, and a stipulation was made to the effect that the suits in equity should be tried first and the law action stand ready for trial thereafter.

Upon the trial of the equity suits the court sustained the charges of fraudulent misrepresentations and decreed cancellation and surrender of the policies. These decrees were reversed by the Circuit Court on the ground that the insurer had an adequate remedy at law. On certiorari the decrees of the Circuit Court were reversed in an opinion by Mr. Justice Cardozo with directions that the Circuit Court consider the cases on their merits. In deciding the cases the Court recognized that fraud in the procurement of the policies is a defense in an action at law, but was of the opinion that this should not necessarily bar equitable relief. Describing the disadvantages which would result to the insurer if compelled to wait until an action at law is brought on the policies, and pointing to the consequent inadequacy of legal remedy, MR. JUSTICE CARDOZO said:

"If the policy is to become incontestable soon after the death of the insured, the insurer becomes helpless if he must wait for a move by some one else, who may prefer to remain motionless till the time for contest has gone by. A 'contest' within the purview of such a contract has generally been held to mean a present contest in a court, not a notice of repudiation or of a contest to be waged thereafter. . . . Accordingly an insurer, who might otherwise be condemned to loss through the mere inaction of an adversary, may assume the offensive by going into equity and there praying cancellation. This exception to the general rule has been allowed by the lower federal courts with impressive uniformity. It has had acceptance in the state courts. It was recognized only recently in an opinion of this court, though the facts were not such as to call for its allowance. Enelow v. New York Life Ins. Co., 293 U. S., 384.

"The argument is made, however, that the insurer, even if privileged to sue in equity, should not have gone there quite so quickly. Six months and ten days had gone by since the policies were issued. There would be nearly a year and a half more before the bar would become absolute. But how long was the insurer to wait before assuming the offensive and how was it to know where the beneficiaries would be if it omitted to strike swiftly? Often a family breaks up and changes its abode after the going of its head. The like might happen to this family. To say that the insurer shall keep watch of the coming and going of the survivors is to charge it with a heavy burden. The task would be hard enough if beneficiaries were always honest. The possibility of bad faith, perhaps concealed and hardly provable, accentuates the difficulty."

Attention was given also to the respondents' argument that the suits in equity should have been dismissed when it appeared upon the trial that actions at law had been brought on the policies. This contention was rejected under the rule that equitable relief existing when the bill is filed is not destroyed because an adequate legal remedy becomes available later. In this connection the opinion states:

"But the settled rule is that equitable jurisdiction existing at the filing of a bill is not destroyed because an adequate legal remedy may have become available thereafter. . . . There is indeed, a possibility that the bringing of actions at law might have been used by the respondents to their advantage if they had not chosen by a stipulation to throw the possibility away. A court has control over its own docket. . . . In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same. . . . If request had been made by the respondents to suspend the suits in equity till the other causes were disposed of, the District Court could

have considered whether justice would not be done by pursuing such a course, the remedy in equity being exceptional and the outcome of necessity. . . .There would be many circumstances to be weighed, as, for instance, the condition of the court calendar, whether the insurer had been precipitate or its adversaries dilatory, as well as other factors. In the end, benefit and hardship would have to be set off, the one against the other, and a balance ascertained. . . . But respondents, as already indicated, gave that possibility away. They stipulated that the issues in equity should be tried in advance of those at law, and that only such issues, if any, as were left should be disposed of later on. The cases were allowed to stand as if challenge to the suits had been made by a demurrer only. So challenged, they prevail."

The cases were argued by Mr. William C. Michaels for the petitioner, and by Mr. Charles G. Yankey for the respondents.

Criminal Law—Fraudulent Entry Under R. S. Section 5209

A bank teller who wilfully withholds deposit slips from entry in order to cover a shortage in his cash account is guilty of making a false entry, under the provisions of Section 5209 R. S., as amended.

U. S. v. Giles, 81 Adv. Op. 364; 57 Sup. Ct. Rep. 340.

This case involved a question of construction of Section 5209 of the Revised Statutes, as amended. It provides that:

"Any officer, director, agent, or employee of any Federal reserve bank, or of any member bank . . . who *makes* any false entry in any book, report, or statement of such Federal reserve bank or member bank, with intent in any case to injure or defraud such Federal reserve bank or member bank, or any other company, body politic or corporate, or any individual person, or to deceive any officer of such Federal reserve band or member bank, or the Comptroller of the Currency, or any agent or examiner appointed to examine the affairs of such Federal reserve bank or member bank, or the Federal Reserve Board . . . shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States shall be fined not more than $5,000 or shall be imprisoned for not more than five years, or both, in the discretion of the court."

The respondent was indicted for violation of this statute. The indictment charged that he, while employed as a teller in the Commercial National Bank of San Antonio, Texas, a member of the Federal Reserve National Bank of Dallas, did "unlawfully, knowingly, wilfully, fraudulently, and feloniously *make and cause to be made* in a book of the said The Commercial National Bank of San Antonio, Texas, . . . a certain false entry." The entry so made was alleged to have shown that the bank's indebtedness to a creditor was in a certain specified amount, whereas in truth and in fact the indebtedness on the date in question was much larger. The respondent was tried and found guilty of the charge, but the Circuit Court of Appeals reversed the judgment, with one of the judges dissenting. The evidence showed in substance that Giles, as teller, came into custody each day of some $35,000 in cash; that it was his duty to receive deposits and to place accompanying slips or tickets where they would reach the bookkeepers for entry. Some months prior to his alleged offense, he discovered a shortage in his cash, but did not report it to his superiors. To cover up the shortage he resorted to the practice of withholding selected deposit slips for a few days before permitting them to reach the bookkeepers. This caused the ledger to show false balances. The shortage on the day charged in the indictment stood at $2,650.00, and on that day he had accepted deposits and had withheld from the bookkeepers slips covering such deposits in an amount approximating the shortage. The Circuit Court of Appeals concluded that on the evidence the respondent had not made any false entry. It said: "Without the charge that he caused the entries to be made he could not have been convicted. It follows that it was prejudicial error to overrule the motion for a directed verdict of acquittal." On certiorari the judgment was reversed by the Supreme Court in an opinion by MR. JUSTICE MCREYNOLDS. In the Supreme Court's opinion the opinion of the dissenting judge in the Circuit Court of Appeals was quoted in part, as follows:

" 'This statute plainly intends to punish the falsification of bank records with intent to deceive or defraud. If false entries are deliberately produced, although through an ignorantly innocent agent, the bank employee who concocts the plan and achieves the result is, in my opinion, guilty. This innocent bookkeeper was the teller's real though unconscious agent in making the entries; as truly so as if the false entries had been requested in words.' "

" 'The present case is not one of a mere failure to prevent a consequence but is one of contriving that consequence and so fathering it as to make it wholly the contriver's own. The bookkeeper in making these false entries was doing the will of the teller, though he did not know it. The false entries are in law the acts of the teller who planned them and did all he needed to do to produce them.' "

Following this, the opinion summarizes the contention that the respondent did not cause any false entry to be made; that he personally made no such entry; that he did not affirmatively direct one; and that by withholding the ticket he prevented an entry. Rejecting these contentions, the Court said:

"The rule, often announced, that criminal statutes must be strictly construed does not require that the words of an enactment be given their narrowest meaning or that the lawmaker's evident intent be disregarded . . . Here the purpose to insure the correctness of bank records by prescribing punishment for any employee who, with intent to deceive, etc., deliberately brings about their falsification is plain enough. The statute denounces as criminal one who with intent, etc., 'makes any false entry.' The word 'make' has many meanings, among them 'To cause to exist, appear or occur,' Webster's International Dictionary, 2nd Ed. To hold the statute broad enough to include deliberate action from which a false entry by an innocent intermediary necessarily follows, gives to the words employed their fair meaning and is in accord with the evident intent of Congress. To hold that it applies only when the accused personally writes the false entry or affirmatively directs another so to do would emasculate the statute—defeat the very end in view.

"*Morse* v. *United States,* 174 Fed. 539, 547, 553—Circuit Court of Appeals, Second Circuit—gave much consideration to an indictment and conviction under R. S., Section 5209. The Court said: 'It is true that the defendant did not make any of the entries in the books or reports with his own pen. All of them were made by the employees of the bank as part of their routine work. If it were necessary to prove against a director that he actually made the entry charged to be false, conviction under the statute would be impossible, as these entries are invariably made by subordinates in the executive department. Congress was not seeking to punish the ignorant bookkeeper who copies items into the books as part of his daily task, but the officers who conceived and carried out the fradulent scheme which the false entry was designed to conceal. It is wholly immaterial whether such officer acts through a pen or a clerk controlled by him.' 'It seems to us that defendant is as fully responsible for any false entries which

necessarily result from the presentation of these pieces of paper which he caused to be prepared as he would if he had given oral instructions in reference to them or had written them himself.'

"We agree with the view so expressed in that opinion."

The case was argued by Assistant Attorney General McMahon for the Government, and by Mr. Will A. Morriss for the respondent.

Bankruptcy—Reorganization Under Section 77B

Where a District Court has dismissed a petition for reorganization under Section 77B of the Bankruptcy Act, and the time to appeal from the order of dismissal has expired, the District Court may, nevertheless, grant a rehearing and reconsider the case on its merits, if no intervening rights will be prejudiced by such action.

Wayne United Gas Co. v. Owens-Illinois Glass Co. et al., 81 Adv. Op. 300; 57 Sup. Ct. Rep. 382.

In this opinion, the court passed on a question as to the power of a federal District Court to set aside its order dismissing a petition for reorganization under Section 77B of the Bankruptcy Act, and to rehear the cause, after the expiration of the time allowed for an appeal from such order.

On March 2, 1936, the petitioner's petition for reorganization under Section 77B was dismissed, and an appeal from such order was denied by the Circuit Court of Appeals on April 15, 1936. Later, on April 24, 1936, the debtor filed a petition for rehearing in the District Court and on May 12 that court set aside its order of March 2nd and granted a rehearing. On May 22, 1936, an amended and supplemental petition for reorganization was filed, which, after hearing, was dismissed on May 28, 1936. The debtor appealed also from that order of dismissal, and the Circuit Court of Appeals dismissed the appeal on the ground that the District Court was without power to grant a rehearing and set aside its order of March 2nd after expiration of the time allowed for appeal of that order. On certiorari this ruling was reversed by the Supreme Court in an opinion of MR. JUSTICE ROBERTS.

In deciding the case the Court first adverted to the respondents' contention that the controversy had become moot by reason of proceedings in a state court resulting in a sale of the debtor's property. In passing, the Supreme Court expressed the view that the respondents' position in this connection could not be sustained since they had gone forward with proceedings in the state court with full knowledge that a rehearing might be granted in the federal court, and that the order entered thereon might be appealed.

The Court then considered the question of the District Court's power to set aside its first order of dismissal and rehear the case. The respondents contended that after the time for taking an appeal had expired the District Court was without power to rehear the case, and that its second order was a nullity, and that consequently, the appeal under Section 24 (b) of the Bankruptcy Act was out of time, because taken more than thirty days after the original order of March 2nd. In support of this contention the respondents argued that rules in equity are applicable to bankruptcy proceedings, and that, the term having expired when the first order was set aside, the District Court had no power to act. In answer to this contention the Supreme Court pointed out that bankruptcy courts sit continuously, and have no terms, and that consequently, the practice in equity based on terms of court is inapplicable.

The respondents urged in the alternative that where an adjudication is refused and the case retired from the docket, the requirement that an appeal shall be perfected in thirty days from an order of dismissal deprives the court of the power to reinstate and to rehear the cause after the time for an appeal has expired. Rejecting this contention, MR. JUSTICE ROBERTS observed that no rights had intervened to make it inequitable to reconsider the merits, and concluded that the District Court had not abused its discretion in setting aside its first order and again considering the merits. In this connection, he said:

"But we think the court has the power, for good reason, to revise its judgments upon seasonable application and before rights have vested on the faith of its action. Courts of law and equity have such power, limited by the expiration of the term at which the judgment or decree was entered and not by the period allowed for appeal or by the fact that an appeal has been perfected. There is no controlling reason for denying a similar power to a court of bankruptcy or for limiting its exercise to the period allowed for appeal. The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a motion therefor, or the refusal of the motion, if entertained, is not the subject of appeal. A defeated party who applies for a rehearing and does not appeal from the judgment or decree within the time limited for so doing, takes the risk that he may lose his right of appeal, as the application for rehearing, if the court refuse to entertain it, does not extend the time for appeal. Where it appears that a rehearing has been granted only for that purpose the appeal must be dismissed. The court below evidently thought the case fell within this class. On the contrary, the rule which governs the case is that the bankruptcy court, in the exercise of a sound discretion, if no intervening rights will be prejudiced by its action, may grant a rehearing upon application diligently made and rehear the case upon the merits; and even though it reaffirm its former action and refuse to enter a decree different from the original one, the order entered upon rehearing is appealable and the time for appeal runs from its entry. The District Court's action conformed to these conditions. Two days after the Circuit Court of Appeals dismissed the petition for allowance of appeal from the original order of March 2, 1936, petitioner notified respondents of its intention to apply for rehearing. Prompt application was made and the cause was promptly heard. A supplemental petition was presented and entered upon the files by leave of court. The original, the amended, and the supplemental petition were considered upon the merits, and the court made findings and announced conclusions of law with respect thereto. There is no indication that the petition for rehearing was not made in good faith or that the court received it for the purpose of extending petitioner's time for appeal. The court found that no rights had intervened which would render it inequitable to reconsider the merits. There was no abuse of sound discretion in granting the motion and reconsidering the cause."

The case was argued by Mr. Robert S. Spilman for the petitioner, and by Mr. H. D. Rummel for the respondents.

Banks—Stockholder's Liability—Enforcement of Liability

Where the state constitution provides that the stockholders of state banks shall be liable to the extent of their respective shares for liabilities of the bank, the state legislature has power to regulate and change the remedies for enforcement of such liability. A change in the remedy for enforcement of such liability does not violate the contract clause of the federal Constitution, especially where the first

statute contains a reservation of power in the legislature to alter or repeal it.

Stockholders of the Peoples Banking Co. of Smithsburg, Md. v. Sterling, 81 Adv. Op. 327; 57 Sup. Ct. Rep. 386.

In this case stockholders of banking corporations in Maryland contended that a state statute defining the form of their liability violates the contract clause of the federal Constitution. Two appeals were dealt with in the Supreme Court's opinion.

In No. 298, the liability in question was that of stockholders of the Peoples Banking Company of Smithsburg, incorporated in 1910, which closed its doors in June 1931. Upon failure of the bank, its receiver petitioned a State Circuit Court for an order assessing stockholders at 100% of the par value of their shares. Such an order followed, in conformity with the provisions of an act of 1910. While a good many of the shareholders had acquired their stock subsequent to the enactment of the Act of 1910, thirteen, holding a relatively small portion (345 shares), had acquired their stock before the law of 1910 was passed, and nearly all the appealing stockholders were also depositors, and hence creditors. The State Circuit Court, on petition of the shareholders, held the statute void, and revoked the previous order imposing liability on them as stockholders. On appeal the Maryland Court of Appeals rejected the decree and sustained the statute.

On further appeal the Supreme Court affirmed the latter decree, in an opinion by MR. JUSTICE CARDOZO. In dealing with the case he first described the statutory changes which have been wrought in Maryland affecting the liability of stockholders. It was pointed out that the Constitution of Maryland of 1867 provides that "the General Assembly shall grant no charter for Banking purposes . . . except upon the condition that the Stockholders shall be liable to the amount of their respective share or shares of stock in such Banking Institution, for all its debts and liabilities upon note, bill or otherwise." When the Smithsburg Bank was organized a State statute of 1870 was in force, imposing upon stockholders and directors liability to the amount of their shares for all debts of the bank, and further providing that the statute might be altered or repealed. As construed, the statute of 1870 was not enforcible by the bank on its insolvency or by a liquidator or receiver, but was enforcible by a creditor individually on the theory that the right of action rested on an implied contract by the creditor and the shareholder at the time the debt was created. Hence, the liability being contractual, it did not extend to stockholders becoming such after the debt was in existence; and, on the other hand, the stockholder could reduce its liability by off-set or counterclaim.

In 1910, shortly after the incorporation of the bank, the earlier remedy was abrogated and a new one substituted. Under the new procedure the cause of action previously enforcible by creditors separately became enforcible by the receiver suing on behalf of all the creditors. And the assessment was laid on all stockholders at the time of liquidation irrespective of their relation to the bank at the time the debts were created. Set-offs and counterclaims were likewise done away with.

The question for decision was whether the changes made as to the enforcement of the liability contervened the contract clause of the federal Constitution. This question was decided in the negative by the Supreme Court for two reasons: (1) The statutory changes were directed at remedies rather than substantive liability, and (2) A change in substantive liability was permissible under the reserved power to alter or repeal.

In approaching the question, MR. JUSTICE CARDOZO first emphasized that the statute of 1870 did not exhaust the constitutional liability by creating a particular remedy, and that the legislature was free to provide a more effective remedy. In this connection he said:

"The remedy first established was found to be unworkable. . . Still acting within the limits of the constitutional command, the legislature of Maryland announced another remedy, less unwieldy and confusing. In the view of the state court, the substantive liability as the Constitution had created it was the same under the new procedure as it had been from the beginning. . . The court was far from holding that the statute had enlarged it. What had happened was merely this, that another remedy had been established to implement a liability created long ago. . . We cannot see in this an attempt to lay upon the stockholders by force of later legislation a new and different burden from that accepted at the outset. Nor would it help the appellants anything to assume in their behalf that the Constitution of the State has been given a new meaning, if the new meaning is not due to the compulsion of a statute. Change by judicial construction of antecedent legislation does not impair a contract, at least in the forbidden sense, if it be granted *arguendo* that such a change can be discovered. . . The new meaning, if there is any, is not ascribed to the Constitution because a later statute has said it must be done. The new meaning is the product of the independent judgment of a court. So the state court has told us, and the good faith of its declaration is not successfully impeached. . . To changes thus wrought the Constitution of the United States does not offer an impediment."

As an additional ground for its decision, the Court stated that even if the later statute had increased the substantive liability the statute would be valid none the less by virtue of the reservation which the legislature made of power to alter or repeal the bank's charter.

"The result would not be different if the effect of the statutory amendments were to be viewed as an enlargement of the substantive liability for debts afterwards contracted, the enlargement being applicable to stockholders without exception, present as well as future. The charter was accepted subject to the condition that the personal liability then prescribed by statute should be subject thereafter to repeal or alteration. This court has held that when such a condition attaches to a charter, there is no unconstitutional change of the obligation of a contract by a subsequent enlargement of the liability of stockholders as to debts afterwards contracted, though the shares so affected were acquired before the change was made. . . . Stockholders who subscribe to stock subject to such a condition assume the risk that their relation to the corporation may be altered to their prejudice. Nor is their position any stronger because the new liability is heavier (if so it be assumed to be) than that imposed upon them directly by the Constitution of the State. The constitutional liabiliy is not a maximum, but a minimum, and the legislature does not transcend the bounds of legislative power by increasing it thereafter."

No. 299, covered by the opinion, related to Shareholders of the Hagerstown Bank and Trust Company. Since all the complaining stockholders in that case had acquired their shares after the enactment of the Act of 1910, the reasoning in No. 298 was thought applicable with even greater force.

The cases were argued by Messrs. Charles F. Wagaman and John Wagaman for the appellants, and

by Messrs. William H. Bovey and R. H. McCauley. for the appellees.

State Statutes—Regulation of Production of Gas

Although the state has power to regulate the production of natural gas in order to prevent waste, and may prorate production for that purpose and to prevent undue drainage of gas from reserves of well owners lacking pipe line connections, it may not limit the production of well owners having pipe line connections for the sole purpose of compelling them to purchase gas from other well owners lacking pipe line connections, who, by reason of such lack, have no access to other markets for their gas.

A proration order made for the latter purpose takes the property of one person for another without warrant of law and in violation of constitutional rights, where, as here, the taking is not for any public purpose and is without compensation.

Thompson, et al., v. Consolidated Gas Utilities Corp., et al., 81 Adv. Op. 270; 57 Sup. Ct. Rep. 364.

This opinion, by MR. JUSTICE BRANDEIS, dealt with a case challenging the validity of a gas proration order of the Railroad Commission of Texas, issued December 10, 1935, as supplemented. The order was entered under an Act of 1935, commonly known as House Bill 266. Two suits were brought to enjoin enforcement of the order, and they were tried together and consolidated for purposes of appeal. The District Court, three judges sitting, concluded as a matter of construction that the order challenged was made without statutory authority. On appeal, the decree, enjoining enforcement of the order, was sustained by the Supreme Court, on the ground that the order deprived the plaintiffs, appellees, of their property without warrant of law.

The opinion of the Supreme Court goes fully into the findings of the District Court, and deals at length with factual matters supporting its decree. An abbreviated statement will suffice here to afford an understanding of the legal questions. It appeared that the plaintiffs have valuable gas rights in the Texas Panhandle fields, and own wells and pipe line facilities for delivery of gas to markets in distant cities, where the complainants have contracts with local distributing companies. Many other owners of wells in the fields are without pipe lines, and hence have no access to markets for their gas. None of the pipe lines involved is a common carrier.

The order in question reduced the plaintiff's allowable production of gas far below their requirements. They urged that the purpose and effect of the proration order was not to prevent waste of gas in a common reservoir, or to prorate the opportunities of production as distinguished from marketing; that the limitation on production was merely a device to compel them, and other pipe line owners, to purchase gas for which they have no need; and that the real purpose and effect of the order are not to prorate production, but to prorate distant markets and facilities for serving them.

The District Court made extensive findings of fact, wherein it was found that the plaintiffs have ample gas to supply their own requirements, and that the drastic reduction called for by the order will deprive them of such protection as they can get against migration of gas from their fields to low pressure areas. It was found, moreover, that the plaintiffs conducted their operation prudently and skillfully, without physical waste; and that the order was not made to prevent waste or intended to adjust correlative rights in a common reservoir, or to avert unjust drainage from the reserve of wells lacking pipe line connections.

The Supreme Court, after summarizing the findings and proceedings of the District Court, first gave attention to the question whether the case should be decided on grounds of statutory constructions. The Court concluded that, since it could not give a definitive answer as to the meaning of the statute, consideration would have to be given to the constitutional questions raised. The reasons for placing the decision on constitutional grounds were thus stated by MR. JUSTICE BRANDEIS.

"We are always reluctant to pass upon a seriously controverted question of the meaning of a state statute, because our decision, although disposing of the particular case, cannot settle the issue of the proper construction of the statute. No court of the State has construed the Act. The defendants might, perhaps, have secured its construction by the state court. For the amendment of Section 266 of the Judicial Code made in 1913, provides that upon the institution of an appropriate suit in a state court, a stay may be had of the proceedings in the federal court to await adjudication by the state court. But no suit in a state court was instituted by the defendants to that end. When not instructed by some decision of a state court, we are disposed, in exercising appellate jurisdiction, to accept the construction given by the lower federal court to a statute of the State, particularly when that court is composed, as in this instance, wholly of citizens of the State, familiar with the history of the statute, the local conditions to which it applies, and the character of the State's laws. But, being under duty to make an independent study of the question, we have done so. That study leaves us in grave doubt whether the lower court has correctly interpreted the intention of the lawmakers. On the other hand, we are clearly of opinion that if the Act were construed as the defendants contend it should be, and as the Commission has applied it, it would violate the Federal Constitution. As a general rule it is no less true with reference to State than to Federal legislation that this Court will not decide an issue of constitutionality if the case may justly and reasonably be decided upon a construction of the statute under which the act is clearly constitutional. . . But where one party's case depends upon a construction of a state statute under which it plainly must be held to violate the Federal Constitution, and where the proper construction of the statute is a matter of grave doubt, this Court will rest its decision on the Constitution, and will not undertake to decide the question of construction as to which it lacks the power to give a definitive answer. . . We, therefore, accept, for the purposes of our decision, the defendants' construction; and pass to the discussion of constitutional questions."

In dealing with the constitutional issues, MR. JUSTICE BRANDEIS first stated that it was assumed that prohibition of waste was lawful, and that proration to prevent waste or undue drainage from wells lacking pipe connections could lawfully be made by the state. Moreover, incidental benefits thereby resulting to private persons would present no constitutional obstacle.

But the effect of the challenged order could not be sustained on any such ground. As to it, the opinion states:

"But the sole purpose of the limitation which the order imposes upon the plaintiff's production is to compel those who may legally produce, because they have market outlets for permitted uses, to purchase gas from potential producers whom the statute prohibits from producing because they lack such a market for their possible product. Plaintiffs' operations are neither causing nor threatening any overground or underground waste. Every well owner in the field is free to produce the gas, pro-

vided he does not do so wastefully. He is legally and, so far as appears, physically free to provide himself with a market and with transportation and marketing facilities. There is no basis for a claim that his right, or opportunity, will be interfered with by a disproportionate taking by any one of those who may legally produce.

"The lower court found specifically:

" 'The terms and provisions of the orders attacked, the necessary operation and effect of such orders, the history of the field and other pertinent facts as disclosed by his record conclusively establish that the purpose of the Commission underlying the orders was, upon a theory of protecting correlative rights to coerce complainant and other (others) similarly situated to buy gas from, and thus to share their private marketing contracts and commitments and the use of their pipe lines and other facilities for transmitting their gas to market with, the owners of wells not now connected to pipe lines, who have not contributed in money, services, negotiations, skill, forethought or otherwise to the development of such markets and the construction of such pipe lines and other facilities. In short to compel complainants to afford markets to those having none.

" 'The necessary operation and effect of such orders is to take from complainant and others similarly situated substantial and valuable interests in their private marketing contracts and commitments and in the use of their pipe lines and other facilities for transmitting their gas to their markets, without compensation, and to confer same upon the owners of the approximately 180 sweet gas wells in the field not connected to pipe lines.'

"The use of the pipe line owner's wells and reserves is curtailed solely for the benefit of other private well owners. The pipe line owner, a private person, is, in effect, ordered to pay money to another private well owner for the purchase of oil which there is no wish to buy. Moreover, he is thus prevented from protecting himself, to the extent that he is able to market his gas, against the losses which the court below finds are occurring and will continue to occur due to drainage from the high pressure areas, wherein plaintiff's wells are located, to the existing low pressure areas, in which are located the majority of the wells not connected to pipe lines. There is here no taking for the public benefit; nor is payment of compensation provided. Plaintiff's pipe lines are private property. So far as appears, they are constructed on private lands. There is no suggestion that any of them is a common carrier of gas. The purpose of the owners in constructing the pipe lines was for the transport of gas only from their own leases, and such has been their consistent policy."

After observing that the purpose of the order is the same as that sought in the "Common Purchaser Act" condemned in *Texoma Natural Gas Co. v. Railroad Commission*, 59 F. (2d) 750, MR. JUSTICE BRANDEIS continued:

"The order disables the plaintiffs from performing their contracts except by means of purchases. Resort to those means necessarily results in depriving the plaintiffs of property. Under each statute, if obeyed, the State takes from the pipe line owner the money with which the purchase is made, the money lost through curtailed use of properties developed at large expense, the money lost because of the drainage away from his land of the gas which he is forbidden to produce for himself, but must buy from those towards whose land it migrates.

"Our law reports no more glaring instance of the taking of one man's property and giving it to another. In *Missouri Pacific Ry. Co.* v. *Nebraska*, 164 U. S. 403; *Missouri Pacific Ry. Co.* v. *Nebraska*, 217 U. S. 196; *Great Northern Ry. Co.* v. *Minnesota*, 238 U. S. 340; *Great Northern Ry. Co.* v. *Cahill*, 253 U. S. 71; *Delaware, Lackawanna and Western R. R. Co.* v. *Morristown*, 276 U. S. 182; and *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.* v. *Holmbury*, 282 U. S. 162, expenditures directed to be made for the benefit of a private person were held invalid, although the party ordered to pay was a common carrier. In *Loan Association* v. *Topeka*, 20 Wall. 655, and *Cole* v. *La Grange*, 113 U. S. 1, the payments ordered for the benefit of a private person were declared invalid, although the money was to be raised by general taxation. In *Myles Salt Co., Ltd.* v. *Board of Commissioners*, 239 U. S. 478, the exaction was held unlawful, though imposed under the guise of an assessment for alleged betterments. . . And this Court has many times warned that one person's property may not be taken for the benefit of another private person without a justifying public purpose, even though compensation be paid."

The case was argued by Messrs. William Madden Hill and C. C. Small for the appellants, and by Mr. S. A. L. Morgan for the appellees.

Taxation—Validity of Statute Imposing Fees on Public Utilities to Pay Expenses of Utility Regulation

The Washington statute imposing a fee of 1/10 of one percent. of gross operating revenue on certain public utilities is not void on its face, but is invalid as applied to an interstate common carrier by rail, where it appears that the railroad company is subject to ordinary ad valorem taxes, and the fees charged for purposes of regulation exceed, by a substantial amount, the expense of carrying out the regulatory provisions relating to such carrier. In such circumstances the exaction is in conflict with the commerce clause of the Constitution and with the due process clause of the Fourteenth Amendment.

Great Northern Ry. Co. v. St. of Washington, 81 Adv. Op. 350; 57 Sup. Ct. Rep. 397.

This case arose on a suit brought by the appellant to recover fees paid under protest to the State Department of Public Works of the State of Washington for the years 1929-1933. The fees were collected under a state statute which provides that all public utilities, subject to regulation by the department, shall file with the department a statement of gross operating revenues for the preceding calendar year, or fraction thereof, and pay to the department 1/10 of one percent of such revenue. All sums so collected are paid to the state treasurer into a fund known as the Public Service Revolving Fund. Under decisions of the State Supreme Court, the exaction is defined as a regulatory or inspection fee, and the fund must be used solely for administering the state public service commission law.

The complaint alleged that the Department of Public Works exercises jurisdiction over various public utilities including rail carriers, and engages in many activities unrelated to supervision and inspection of rail carriers, and has a variety of duties in the enforcement of the state's police power. It was further claimed that the fee is not based on, or restricted to the cost of legitimate regulation or inspection, but is used to defray the expense of other activities, and that to January 1, 1933, fees had been collected to an amount of $250,000 in excess of that expended by the department in discharging all its duties, and that the statute is in truth a revenue measure; and that the state taxes the appellant's property and other like property on an *ad valorem* basis. The complaint charged that the fee is a burden on interstate commerce in violation of the federal Constitution, and also that it was so arbitrary, excessive, and discriminatory as to be a denial of equal protection and due process, contrary to the Fourteenth Amendment.

The answer admitted that the fees in question had been paid under protest, that the department exercises jurisdiction over many classes of public utilities in-

cluding rail carriers, and that the plaintiff's property is assessed and taxed on an *ad valorem* basis, but denied substantially all other allegations of the complaint.

At a trial without a jury, evidence consisting largely of annual reports of the department was introduced. From this and the relevant statutes it appeared that the department regulates various public utilities, that it exercises functions unrelated to inspection and supervision and has the duty of participating in litigation before the Interstate Commerce Commission affecting citizens of the State, and of acting judicially in decreeing refunds of overcharges. These functions, while unrelated to the inspection and regulation of railroads, entail large expense. During the years in question, no legislative appropriation was made out of the State's general funds for the expenses of the department, all such expenses being paid indiscriminately from the fees under the statute in question. No separate accounts are kept or required by law to be kept relating to the expense of various activities of the department and the form of its accounts makes it impossible to determine the expense of regulating and inspecting railroads separate and apart from expenses incidental to other activities.

However, the appellant called the department's auditor who testified that the exaction goes to build up a fund which is used to pay all departmental expenses; that he had figures classifying expenditures according to the various kinds of utilities subject to regulation, and that these figures were kept by him apart from any legal duty to do so. He testified that he had lumped all expenditures relating to railroads without separation of the costs of inspection and regulation, rate hearings, etc. The State later called the same auditor who testified that during the period in question the disbursements charged to the railroads exceeded the receipts from railroads in the amount of $37,833. It further appeared, on cross examination, that he had no personal knowledge as to the basis for the allocation of these expenses, but that the same are made from slips turned in by various employees in the department. The appellant objected to this evidence and moved to strike it as hearsay, but the trial court let it stand. The trial court entered judgment for the appellant, which was reversed by the State's Supreme Court. On further appeal the Supreme Court reversed the judgment in an opinion by MR. JUSTICE ROBERTS.

He first stated the governing principles as follows:

"The principles governing decision have repeatedly been announced and were not questioned below. In the exercise of its police power the state may provide for the supervision and regulation of public utilities, such as railroads; may delegate the duty to an officer or commission; and may exact the reasonable cost of such supervision and regulation from the utilities concerned and allocate the exaction amongst the members of the affected class without violating the rule of equality imposed by the Fourteenth Amendment. The supervision and regulation of the local structures and activities of a corporation engaged in interstate commerce, and the imposition of the reasonable expense thereof upon such corporation, is not a burden upon, or regulation of, interstate commerce in violation of the commerce clause of the Constitution. A law exhibiting the intent to impose a compensatory fee for such a legitimate purpose is *prima facie* reasonable. If the exaction be so unreasonable and disproportionate to the service as to impugn the good faith of the law it cannot stand either under the commerce clause or the Fourteenth Amendment. The state is not bound to adjust the charge after the fact, but may, in anticipation, fix what the legislature deems to be a fair fee for the expected service, the presumption being that if, in practice, the sum charged appears inordinate the legislative body will reduce it in the light of experience. Such a statute may, in spite of the presumption of validity, show on its face that some part of the exaction is to be used for a purpose other than the legitimate one of supervision and regulation and may, for that reason, be void. And a statute fair upon its face may be shown to be void and unenforceable on account of its actual operation. If the exaction be clearly excessive it is bad *in toto* and the state cannot collect any part of it."

It was then noted that the statute was challenged: (1) as void on its face, since the fee is not imposed for, or limited by, the reasonable cost of supervision; and (2) if not void on its face, the case made relative to the operation of the act imposed on the appellee a burden of proof which it failed to carry. In dealing with these contentions, the Supreme Court concluded that the statute was not void on its face. Notwithstanding this, it found that the proof offered by the appellant was sufficient to shift to the State a burden which the latter had not discharged. In this connection, the Court referred to *Foote & Co., Inc. v. Stanley*, 232 U. S. 494. In that case the Court held that, as applied, a statute of Maryland imposing an inspection charge of one cent a bushel on oysters moving in interstate commerce was a burden on interstate commerce and a violation of the constitutional provision forbidding any state to lay any import or export duties without consent of Congress, except "what may be absolutely necessary for executing its inspection laws." As to the authority and application of that case, MR. JUSTICE ROBERTS said:

"The court examined the evidence as to the operation of a prior law which levied the same charge per bushel and which the challenged act superseded, consisting of the annual reports of the comptroller, and found therefrom that one-third of the amount collected was sufficient to pay the cost of inspection and the other two-thirds had been appropriated to 'other expenses of the Fishery Force.' In the light of the operation of the previous act, and the failure of the state to show that the amount collected under the new law would not be more than was necessary for the expenses of inspection proper, the challenged statute was held void.

"There are factual distinctions between the cited case and the instant one, but they do not affect the binding authority of the former. The law under consideration in the *Foote* case was purely an inspection measure. That here under review is characterized by the state court as one for regulation and inspection. The specific mandate of the federal Constitution limiting state inspection fees to an amount absolutely necessary for executing a state's inspection law was treated in the *Foote* case as raising the same issue as was presented in earlier decisions with respect to the bearing of the commerce clause upon the imposition of regulatory and inspection fees imposed upon local property of interstate enterprises. And the cases decided under the commerce clause dealing with the reasonableness of regulation and inspection fees have been treated by this court as apposite to the guarantees of the Fourteenth Amendment. In the *Foote* case reference to the accounts and records kept by state authority disclosed the extent of the excess of receipts over expenditures, whereas here it is demonstrated that while expenses other than those of inspection and regulation of railroads are paid out of the fees, the amount of the excess over what is necessary for regulation and inspection cannot be ascertained from the department's accounts. The *Foote* case is authority that in such circumstances the burden is on those seeking to collect the charge."

Attention was then turned to the question whether the evidence in this case preponderated in favor of the

State. After emphasizing the rule that, where there is involved a federal right depending on a mixed question of law and facts, the Court will examine the facts, the opinion concludes with an analysis of the testimony, from which it was determined that the State had failed to sustain the burden of proof which had shifted to it.

"While holding the testimony of the department auditor competent, the state court omits to refer to the fact that the figures he presented were not allocated so as to show the amounts spent for inspection and regulation and those expended for other so-called railroad charges which could not be imposed upon the railroads. As has been pointed out, the evidence is uncontradicted and conclusive that the sums he mentioned as having been expended for railroad account did include substantial, and apparently large, amounts for activities in the interest of interstate shippers and for the trial of reparation cases. It is impossible to sustain the state court's conclusion that such testimony had any probative value upon the sole issue in the cause, which was whether the statute subjects the railroads to an unreasonably excessive charge for inspection and regulation. As was said in the *Foote* case, the state is at liberty to intermingle duties involving costs properly chargeable to the railroads, with others involving costs not so chargeable, but if it does so, and the exaction is challenged, it must assume the burden of showing that the sums exacted from the appellant do not exceed what is reasonably needed for the service rendered. The State failed to carry this burden."

MR. JUSTICE CARDOZO delivered a dissenting opinion in which the CHIEF JUSTICE, MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concurred. In this opinion the view was taken that *Foote v. Stanley* is inapplicable, for the reason that there an impost on interstate commerce was involved, which by the terms of the Constitution, is expressly limited to amounts "absolutely necessary" for the purpose of inspection. While in such a case as that the State must bring itself within the exception, it was thought that such a rule should not be extended to a case such as that here, as to which the State is under no express prohibition. To emphasize this point, MR. JUSTICE CARDOZO called attention to the fact that the exaction is limited to gross revenues, confined, however, to operations in interstate commerce, and that under other statutes of the state different rates are made applicable to auto transportation companies and steamship companies. He added:

". . . Plainly there is no presumption that these varying contributions are out of proportion to the expenses incurred in supervising and regulating the several classes of contributors. Illegality, if there is any, is to be found in the administration of the statute, and not in anything inherent in its essential scheme and framework That being so, the taxpayer may not rest upon a showing of possible overpayment. There must be a showing of an overpayment not merely possible but actual, and one substantial in amount. . . To hold otherwise would be to go counter to the settled rule that 'one who would strike down a state statute as obnoxious to the Federal Constitution must show that the alleged unconstitutional feature injures him.' . . Analogies drawn from the law of trusts are inapposite and misleading. The state does not collect the taxes or place them in the fund as trustee for the contributor or for any one else. It receives the moneys and expends them as an owner, charged with no other duty to a particular group of taxpayers than to members of the public generally.

"The burden resting on the railroads to show that the use of the common pot has resulted to their damage, the record must be scrutinized to see whether the burden has been borne. In that scrutiny there is no denial of a duty to inquire whether the decision of the state court, irrespective of its surface protestations, amounts in substance and reality to the denial of a federal right. . ."

The dissenting opinion also discusses an objection to the effect that the documents on which the auditor based his testimony would not be competent even if produced. In this connection it was pointed out that the Fourteenth Amendment does not confine the state courts to common law rules of evidence, and that hearsay is competent evidence in many countries, and even under the common law in certain restricted cases.

The case was argued by Messrs. Thomas Balmer and L. B. da Ponte for the railroad and by Mr. George G. Hannan for the State.

ALL OTHER CASES DECIDED IN FEBRUARY

(Up to and including Session which met and adjourned on Feb. 15)

No. 171—*Hill v. United States ex rel Weiner.*

Certiorari to C. C. A. (3rd) to review affirmance of order of District Court discharging relator from prison after he had served eleven months of a two-year sentence for contempt of a decree entered in a suit by the United States under the Sherman Anti-Trust Act. Judgment Reversed on ground that § 24 of the Clayton Act restricts the application of 6 months imprisonment limitation of § 25 to prosecutions arising out of cases instituted by private litigants. Opinion by MR. JUSTICE SUTHERLAND. Feb. 1, 1937.

No. 217—*Midland Realty Company v. Kansas City Power and Light Company.*

Appeal from Supreme Court of Missouri to review decision permitting plaintiff power company to recover from defendant, its customer, at the rates filed with and promulgated by the State public service commission under Missouri Public Utility Laws, notwithstanding a prior contract existing between them for payment at lower rates. Judgment affirmed. Opinion by MR. JUSTICE BUTLER. Feb. 1, 1937.

No. 224—*Osaka Shosen Kaisha Line v. United States.*

Certiorari to C. C. A. (5th) to review decision reversing decree of District Court dismissing a libel by United States for a penalty and to enforce a lien against one of petitioner's ships under section 10 of the Immigration Act of 1917. Decree of Circuit Court affirmed on the ground that § 10 applies to vessels which merely stop in a United States port of call on the way from one foreign port to another. Opinion by MR. JUSTICE SUTHERLAND. Feb. 1, 1937.

No. 247—*Blair v. Commissioner of Internal Revenue.*

Certiorari to C. C. A. (7th) to review reversal of decision of Board of Tax Appeals, holding that under Federal Income Tax laws the beneficiary of a testamentary trust was not liable for a tax upon income which he had assigned to his children prior to the tax years and which the trustees had paid to them accordingly. Judgment reversed and cause remanded with directions to affirm Board of Tax Appeals. Opinion by MR. CHIEF JUSTICE HUGHES. Feb. 1. 1937.

No. 253—*Wayne County Board of Review v. Great Lakes Steel Corporation.*

Appeal from a decree of a three-judge District Court (E. D. Mich.) granting a permanent injunction to restrain enforcement of a Michigan Statute establishing a county board of review of assessments for counties having a population in excess of 500,000, on the ground that the statute violated Article 30, § V of the State Constitution. Decree affirmed. Opinion *per curiam.*

No. 254—*Cummings v. Deutsche Bank und Disconto-Gesellschaft.*

Certiorari to review judgment of Court of Appeals for District of Columbia reversing an order of Supreme Court

of the District dismissing a bill for a decree directing delivery to respondent of certain property seized by Alien Property Custodian under Trading with the Enemy Act of 1917. Judgment reversed on ground that Public Resolution No. 53 (June 27, 1934) had not withdrawn jurisdiction of such cases from Supreme Court of the District. Resolution held not to violate 5th Amendment. Opinion by MR. JUSTICE BUTLER. Feb. 1, 1937.

No. 255—*Elmhurst Cemetery Company v. Commissioner of Internal Revenue.*

Certiorari to review judgment of C. C. A. (7th) reversing action of Board of Tax Appeals fixing 1913 value of Petitioner's cemetery land on basis of actual selling price rather than upon sales price less discount for years required to realize selling price. Judgment reversed and Board of Tax Appeals affirmed on ground that Board's conclusions were supported by substantial evidence. Opinion by MR. JUSTICE MCREYNOLDS. Feb. 1, 1937.

No. 257—*Helvering v. Midland Mutual Life Insurance Company.*

Certiorari to C. C. A. (6th) to review reversal of Board of Tax Appeals' decision holding respondent insurance company taxable under Income Tax laws, upon amount bid by it for defaulted interest at forclosure sale of mortgaged property which it had foreclosed, although the interest was not treated as income on corporate books. Reversed. Opinion by MR. JUSTICE BRANDEIS, Dissenting Opinion by MR. JUSTICE MCREYNOLDS. Feb. 15, 1937.

No. 266, 267 and 268—*Ickes v. Fox; Ickes v. Parks; Ickes v. Ottmuller.*

Certiorari to Court of Appeals for District of Columbia to review affirmance of decree denying motion to dismiss bills in equity to enjoin Secretary of the Interior from enforcing order imposing additional water charges and limitations upon water rights of irrigation beneficiaries under Reclamation Act of 1902, because the United States was an indispensable party defendant. Decree affirmed on the ground that the suit is not in effect suit against the United States, but rests upon the charge of abuse of power. Opinion by MR. JUSTICE SUTHERLAND. Feb. 1, 1937.

No. 280—*Taber v. Indian Territory Illuminating Oil Company.*

Certiorari to Supreme Court of Oklahoma to review decision that respondent's oil leases of restricted Pawnee Indian lands are not taxable because lessee was a federal instrumentality not subject to state ad valorem taxes. Judgment reversed on ground that tax is non-discriminatory and does not directly burden governmental powers. Opinion by MR. CHIEF JUSTICE HUGHES. Feb. 1, 1937.

No. 307—*Isbrandtsen-Moller Company, Inc. v. United States.*

Appeal from decree of 3 judge District Court (S. D. N. Y.) denying interlocutory injunction and dismissing bill to restrain enforcement of order of Secretary of Commerce under Sec. 21 of the Shipping Act of 1916 to require appellant to file summary of its books and records showing rates charged by it in its foreign shipping business. Decree affirmed, Secretary's order is authorized by Congress and is constitutional. Opinion by MR. JUSTICE ROBERTS. Feb. 1, 1937.

No. 309—*Kelly, Trustee in Bankruptcy for Carlisle Packing Co. v. United States.*

Certiorari to C. C. A. (9th) to review affirmance of judgment of the District Court allowing respondent's claim for income taxes, because record not properly authenticated as required by Equity Rules 75(b) and 77 although this point was not raised by either party. Judgment reversed and cause remanded on ground that Circuit Court should have granted permission to amend record to correct defects. Opinion by MR. JUSTICE MCREYNOLDS. Feb. 1, 1937.

No. 332—*Dupont v. United States.*

Certiorari to review a judgment of C. C. A. (2nd) holding that a stamp tax under § 800, schedule A(4) of the Revenue Act of 1926, is payable by Petitioner, a cotton exchange broker, upon a transfer by him of a customer's account in cotton futures to another broker through the exchange. Judgment affirmed. Opinion by MR. JUSTICE ROBERTS. Feb. 1, 1937.

No. 335—*United States for the Use of Wilhelm v. Chain, Executrix.*

Certiorari to C. C. A. (4th) to review reversal of judgment of District Court holding defendant executrix liable on bond of deceased as surety for an insolvent depository for bankrupt estates. Judgment of Circuit Court reversed and that of District Court affirmed on the ground that although loss involved had occurred after surety's death, yet contract became binding when bond was approved by Bankruptcy Court and was not terminated by death of surety. Opinion by MR. JUSTICE VAN DEVANTER. Feb. 1, 1937.

No. 370—*Honeyman v. Hanan, Executor.*

Appeal to review decision of New York Court of Appeals affirming without opinion dismissal of action to recover deficiency judgment on mortgage bond after foreclosure and sale of mortgaged property by previous suit. Judgment vacated and cause remanded because record, although supplemented by amended remittitur of State court stating that a federal question was presented and necessarily decided below does not give sufficient information for this court to determine that question. Opinion by MR. CHIEF JUSTICE HUGHES. Feb. 1, 1937.

No. 389—*Knox National Farm Loan Association v. Phillips.*

Certiorari to Court of Appeals of Ohio to review a State court decree directing a National Farm Loan Association to retire respondent's shares therein, giving him judgment for their par value, and appointing a receiver for Association. Reversed and remanded on the ground that such a decree is forbidden under Federal Farm Loan Act of 1916 as amended. Opinion by MR. JUSTICE CARDOZO. Feb. 1, 1937.

No. 442—*O'Connor v. Mills*

Certiorari to C. C. A. (8th) to review order dismissing appeal allowed by District Court from its order dismissing a petition for reorganization under § 77B of the Bankruptcy Act. Reversed and remanded because the order is appealable as of right under § 25(a) of the Bankruptcy Act. Opinion *per curiam*. Feb. 1, 1937.

No. 2—(Original) *Vermont v. New Hampshire.*

Order: Report of Commissioner locating and marking the boundary between Vermont and New Hampshire pursuant to decree of January 8, 1934, (290 U. S. 579) confirmed and commission terminated by order. Feb. 15, 1937.

SUMMARY OF BUSINESS OF SUPREME COURT

February 1 to February 15, 1937

The order of business at the beginning of a session of the Court is as follows:

1st. Reading of opinions in cases ready for decision,
2nd. Announcing orders in other cases,
3rd. Entertaining motions for admission to the Bar, and other motions which may be presented,
4th. The day call of cases is read by the Chief Justice, and argument begun on the first one listed.

Oral arguments presented during the two-week session which began Monday, February 1, 1937, and ended Monday, February 15, 1937, included the following cases:

207-8-9 *Helvering v. Tex-Penn Oil Company.*
Helvering v. Benedum.
Helvering v. Parriott.

228 *Chippewa Indians of Minnesota v. United States et al.*

355 *Hartford Steam Boiler Inspection and Insurance Company et al. v. Harrison.*
397 *The Henderson Company v. Thompson et al.*
404 *New York, ex rel. Cohn v. Graves et al.*
406 *Sumi v. Young.*
446 *Aetna Life Insurance Company v. Haworth.*
451 *Brush v. Commissioner of Internal Revenue.*
454-5 *Phelps v. Board of Education of West New York et al.*
Askam v. Same.
456 *Ingels, as Director of the Motor Vehicle Department of California, et al. v. Morf, et al.*
460 *Beeck, Administrator v. Sabine Towing Company, Inc., et al.*
474-5 *Herndon v. Lowry, Sheriff of Fulton County, Georgia.*
Same v. Same.
324 *Virginian Railway Company v. System Federation No. 40 Railway Employees Department of the American Federation of Labor, et al.*
365 *The Associated Press v. National Labor Relations Board.*
469 *Washington, Virginia and Maryland Coach Company v. National Labor Relations Board.*
419 *National Labor Relations Board v. Jones & Laughlin Steel Corporation.*
420-21 *National Labor Relations Board v. Freuhauf Trailer Company.*
Same v. Same.
422-23 *National Labor Relations Board v. Freidman-Harry Marks Clothing Company.*
Same v. Same.
494 *Swayne and Hoyt, Ltd., et al. v. United States.*
549 *Lawrence, Guardian v. Shaw, et al.*
563 *Hoffman, Substituted for Holsing, Receiver v. Rauch, Administrator.*

Among the orders announced during this two weeks session, probable jurisdiction was noted in four cases on appeal, petitions for certiorari were granted in 13 cases, denied in 58, and one petition was dismissed on motion of petitioner. Petitions for rehearing were denied in nine cases which had previously been decided.

Reviews were allowed in the following cases, and they will come on for argument at a later date.

On Appeal

625 *Fox v. Bravo Contracting Company.*
652 *The Great Atlantic & Pacific Tea Company, et al v. Grosjean, Supervisor, et al.*
647 *First Bank Stock Corporation v. Minnesota.*
658 *Senn v. Tile Layers Protective Union et al.*

On Certiorari

599 *Stroehmann and Lycoming Trust Company v. Mutual Life Insurance Company.*
627 *Mumm v. Decker & Sons.*
600 *United States v. Norris.*
588 *Oppenheimer v. The Harriman National Bank & Trust Company et al.*
670 *The Harriman National Bank & Trust Company v. Oppenheimer.*
602 *Welch, Former Collector v. Obispo Oil Co.*
604 *Ray v. United States.*
605 *American Propeller and Manufacturing Company v. United States.*
614 *Sonzinsky v. United States.*
638 *Steelman, Trustee in Bankruptcy of William Fox v. All Continent Corporation.*
659 *Cincinnati Soap Company v. United States.*
667 *Anniston Manufacturing Company v. Davis, Collector.*
687 *Haskins Bros. & Co. v. O'Malley, Individually and as a Collector.*

The following were restored to the docket and assigned for reargument:

35 *Smith v. Hall.*
36 *Smith v. James Manufacturing Co.*
103 *District of Columbia v. Ethel Clawans.*
418 *Henneford v. Silas Mason Company.*

A new order in Bankruptcy, numbered LIII, entitled "Bond of Designated Depository under Sec. 61" was adopted, to become effective April 5, 1937. The order specifies the conditions of the bond and deals with reports of depositories, the renewal of bonds, and the liabilities of sureties.

In No. 648, *First Bank Stock Corporation v. Minnesota,* the appeal was dismissed on authority of *Rio Grande Ry. v. Stringham,* 239 U. S. 44, 47.

The Court ordered a recess from Monday, February 15th to Monday, March 1st, 1937.

Opinions of Committee on Professional Ethics and Grievances

Opinion 167

(February 13, 1937)

Conflicting interests—It is unprofessional for an attorney to represent conflicting interests. An attorney who has represented an administratrix in an estate cannot accept employment in an action against such administratrix in connection with her duties as such.

A and B were law partners in 1926, and continued as such until April or May, 1928, when the law partnership was terminated. In December, 1926 they were employed by C as administratrix de bonis non of her husband's estate to prosecute an action for the wrongful death of her husband against X. C and her two children, D and E, were the only beneficiaries of the estate.

At the time of C's application for appointment as administratrix de bonis non of her husband's estate (which was prepared by A and B) was filed, A and B became sureties of C's bond as administratrix, in the amount of $2,000.00. The ultimate recovery in May, 1928, was $20,000.00, of which sum C as administratrix received $14,000.00, and A and B received $3,000.00 each for attorneys' fees.

The sum of $14,000.00 was paid over to C by A, and she did not apply to the Probate Court to distribute the sum to the beneficiaries, under favor of the statute then in force.

In April, 1935, D and E brought suit against their mother, C, for an accounting of said funds, and retained F, B and G, as attorneys to prosecute said action. G is associated in the practice of law with B, but was not a member of the firm of A and B, during their law partnership.

C claims that D and E agreed that she should retain the entire amount, and that A and B, through A, in accordance with that arrangement, delivered the $14,000.00 to her and told her the money was hers; hence she did not apply to the Probate Court.

May B or G properly represent D and E?

May B properly testify in the action in behalf of D and E?

The opinion of the Committee was stated by MR. HOUGHTON, Messrs. McCracken, Sutherland, Phillips, Arant, McCoy and Bane concurring.

Canon 6 of Professional Ethics controls this case, the pertinent part of which reads:

"It is unprofessional to represent conflicting interests, except by express consent of all concerned given after a

full disclosure of the facts. Within the meaning of this canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose.

"The obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed."

B is not only an attorney for C, but was a surety on her bond as administratrix. In the suit brought by D and E against C, B could not properly represent either D. or E. He could not represent D or E as an attorney, because the interests of his client C and the adverse parties D and E are conflicting. In addition, as surety on C's bond, he may be a party to a proceeding brought by D and E to collect on the bond.

As attorney for C, any information which B received from C would be as an attorney, and therefore confidential and privileged. He could not testify in an action on behalf of D or E as to any matters pertaining to his confidential relationship as attorney for C. Only with the consent of C, (who might waive the privilege) should he testify in the action in behalf of either D or E.

G later became associated in the practice of law with B, and while he is so associated he should not act as counsel for the plaintiff in an action against his partner's former client, the partner being secondarily liable as surety.

Opinion 168

(February 12, 1937)

Opinions to Trade Associations—The rendering of opinions to a trade association by its general counsel upon problems common to all its members for distribution among the membership is not ethically improper.

A member of the Association inquires as to whether it is ethical for a law firm which is general counsel for a manufacturers' association to render opinions to it upon problems affecting all of its members where the inquiries come from individual members to the central office and are by it transmitted to the law firm. Upon receipt of the opinions the association distributes them to its members over the signature of its general counsel.

The Committee's opinion was stated by MR. MCCRACKEN, Messrs. Sutherland, Phillips, Arant, McCoy, Houghton and Bane concurring.

It is our view that such opinions, where they are applicable to problems common to all members of the association, are not only proper, but that they serve a highly useful purpose. In these days of constantly increasing restrictions imposed by both state and federal governments on the hitherto comparatively unlimited exercise of business enterprise, it is absolutely essential for a law-abiding merchant or manufacturer to be in receipt of ready and continuous advice in order that he may properly conduct his affairs. He must watch his capital structure, his earnings and undistributed surplus, his sales policy, his rights under patent laws, his relations with his competitors as affected by the Anti-Trust laws and such legislation as the Robinson-Patman Act, his foreign trade as affected by the tariff and reciprocity treaties, not to mention the rate of exchange, and practically every other phase of the activities of his industry. The vast majority of business men cannot afford to retain law firms in their constant employ in order to be continually advised upon all of these problems. Hence the cooperative association such as the one here deescribed. The giving of advice upon subjects affecting the group is a proper function of a lawyer, protecting its members from prosecution, penalty and loss and at the same time interpreting the law and encouraging its due observance.

This is to be clearly distinguished from the purchase by the association of advice for an individual member concerning his own peculiar problems and without the full and free disclosure of the factual situation essential to the proper relation of attorney and client.

Opinion 169

(February 12, 1937)

Advertising—It is unethical for an attorney to offer his legal services gratuitously to any organization or association with the expectation ultimately of profiting thereby.

A member of this association requests the opinion of this Committee as to whether it is proper for an attorney to offer his services free of charge to various labor unions, where such services pertain only to their problems as a body and not to those of any individual member. The inquirer believes that the organizations need the advice of attorneys, but that some of them are unable to pay for the same, and hence do not seek legal services. He further states that he hopes that these contacts will lead to his receiving employment from members of the union.

The Committee's opinion was stated by MR. BANE, Messrs. McCracken, Sutherland, Phillips, Arant, McCoy and Houghton concurring.

Without any request on the part of the association, the attorney makes a direct offer of his service to said association. One purpose, among others, for this offer from the attorney is "the hope that these contacts will lead in my receiving employment from members of the union."

In Opinion 148, this Committee said: "The Canon proscribing the solicitation of business is aimed at commercialization of the profession. . . It has to do, moreover, with the effort to obtain remunerative business—the endeavor to increase the lawyer's practice with the end in view of enlarging his income." The offer of such service is clearly solicitation of professional employment for the purpose of ultimately profiting thereby and is condemned by Canon 27.

President Makes Committee Appointments

President Stinchfield has announced the following appointments to new committees of the Association:

Committee on the Economic Condition of the Bar: Lloyd K. Garrison, Madison, Wis., Chairman; John M. Riordan, San Francisco; Mitchell Dawson, Chicago; John M. Niehaus, Jr., Peoria, Ill.; W. A. Roberts, Washington, D. C.; George Z. Medalie, New York City, and John Kirkland Clark, New York City.

Membership Committee: Guy Richards Crump, Los Angeles, Cal., Chairman; John H. Voorhees, Sioux Falls, S. D., and Guy Tobler, Hackensack, N. J.

Committee on Securities Laws and Regulations: Charles R. Hardin, Newark, N. J., Chairman; Professor Ralph F. Fuchs, St. Louis, Mo.; Judge William M. Hargest, Harrisburg, Pa.; Col. John Hinkley, Baltimore, Md., and Seymour W. Heilbron, Philadelphia, Pa.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

LA FAILLITÉ EN DROIT ANGLO-SAXON, par Charley del Marmol. 1936. Paris: R. Pichon et R. Durand-Auzias; Bruxelles: Établissements Émile Bruylant. Pp. xx, 440. This excellent treatise, volume 42 of the Library of the Institute of Comparative Law at Lyons, is introduced in an explanatory preface by the director of the Institute, Professor Édouard Lambert, and also by an appreciation by Professor B. A. Wortley, reader in law at the University of Birmingham, England.

The essay is a historical and critical examination of the statutes, judicial elaborations, and general law applicable to bankruptcy and insolvency in England, the United States, and the British colonial commonwealths. It is framed primarily as a study of the development of the English law down to and including the statute of 1914; but the comparison with the law in the United States is so elaborate that the picture is complete enough to give the reader a thorough understanding of our law as well as that of England, and of its application.

But the book is in no sense a law book. It is purely a study in jurisprudence. It is the sort of essay on the jurisprudential side of bankruptcy law eminently to be desired by American students of other branches of American law. While it is essentially a study in comparative law, it opens vistas, on almost every page, into that undefined science which we have been calling the philosophy of law. It is to be hoped that every federal judge and every referee in bankruptcy, who keeps up his French, will read it. It is to be hoped also that those younger men in America who are preparing to be teachers and writers of law will adopt the method of preparation which impelled Mr. del Marmol to write this essay. He is styled on the title page as "a person approved (agrégé) for higher teaching in commercial law."

The author gives careful attention to some of the new economic United States statutes bearing upon insolvency, and to the decisions which held them unconstitutional. As said by Professor Lambert, in the preface, "It would have been difficult to follow otherwise . . . . the substrata and the effects of the contest which is now going on in the United States between the legislative power and the judicial power on the occasion of amendments whether temporary or permanent in the law of bankruptcy, which depend upon the general experiences of national economic revival of President Roosevelt." So the author says, on p. 351, "In the course of the years 1933 and 1934, the United States have passed through one of the most critical periods of their history. President Roosevelt had to fight against difficulties of every kind, of which one of the chief was the search for solutions to the problem of debts." "In the presence of the failure of enterprises, of the indebtedness of agriculturists, and of the insolvency of the great majority of salaried people, the President of the United States was led to take energetic and rapid measures." "But let us note," he continues, "that certain amendments of the law of bankruptcy have as a primary cause a movement of reform dating from 1930, due to the initiative of President Hoover."

The author describes and explains the effect of all the bankruptcy laws of England, beginning with that of 1571, and ending with that of 1914, upon which the book is framed; and also traces each of the bankruptcy laws of the United States from that of 1800 to that of 1898 with its amendments through 1934, giving the changes and inconsistencies of each one, and explaining the social pressures which brought it to passage.

Especially interesting is his analysis of the social background of the provision in our federal constitution (pp. 46 et seq.) empowering the Congress to pass a uniform bankruptcy law: "The constitution of the United States is presented as essentially the product of a social conflict, accompanied by the necessity, resented by some, of a reinforcement of the federal government. Accepted by the elements of the left,—revolutionaries, radicals, democrats—as serving solely for the putting in order of questions of the outside politic, it appeared in the eyes of the elements of the right,—conservatives, capitalists—as a means of fighting against anarchy inside, and of satisfying personal exigencies. Must we then be astonished that these framers gave to the Congress the power to establish a uniform law of bankruptcy?"

Our first bankruptcy law, that of 1800, was in reality "only a measure destined to facilitate for creditors pursuits when the ordinary methods of execution could not be employed on account of the fraud of a creditor" (p. 66).

The author gives a discussion of each important section of the English law of 1914, and discusses many similar sections of the United States law of 1898 as amended.

HENRY UPSON SIMS.

Birmingham, Alabama.

National Taxation of State Instrumentalities, by Alden L. Powell. (Illinois Studies in the Social Sciences, Volume xx, No. 4.) 1936. Champaign: University of Illinois. Pp. 166. $2.00. This is an interesting and complete study of the timely subject described by its title. Almost the first hundred pages are devoted to the history and present status of the rule that the national government has generally no right to tax the governmental instrumentalities of states and their political subdivisions. The effect of national stamp tax laws on state instrumentalities, the national taxation

of the income of state officers and employes, of obligations of states and their political sub-divisions, of non-governmental agencies and of state educational institutions, are adequately covered.

For those not satisfied with the present state of the law (and there are many such—page Westbrook Pegler) the author discusses various possibilities of changes in the rule so that there may be, particularly, national taxation of the incomes of state and local officers and of the interest derived from state and local obligations with, of course, reciprocal rights to the states to tax similar incomes from national sources. The conclusions reached are provocative and should be of wide interest at this time. Examination and study of the volume by students of the subject will be well repaid.

FOREST D. SIEFKIN.

Chicago.

Taxable Income, by Roswell Magill. 1936. New York: Ronald Press Company. Pp. ix, 437. Congress and the Treasury Department and the courts have wrestled for nearly twenty-five years with the problems of what is income and when and to whom it may be taxed. A review of both problems from the legal viewpoint is timely. Mr. Magill's book is one of a series of two or three, the forthcoming volumes in which will treat the subject from the economist's viewpoint and historically; but the present volume itself touches the latter fields by references to other writings and by frequent comparisons between our taxing system and the British and German systems.

The book contains a comprehensive discussion of the cases and a clear analysis of taxable income in its more fundamental concepts—likely to be lost sight of by the average tax practitioner in the maze of precedents that make up the law as it is. Theory is related to practice, but by no means are the two always in agreement.

The development of the definition of income by the Congress and the extension of the judicial concept of income is traced from the Civil War income tax acts through the corporation excise tax law and the various income tax acts beginning with that of 1913, and from *Eisner v. Macomber,* 252 U. S. 189 (1920), with its "cryptic" definition of income, down to the very recent cases that declare one taxable upon income which arises from property that does not belong to him, and his benefit from which is, to say the least, indirect.

Questions such as taxing to one the realization of gain that accrued in the hands of another, as in the case of the transferee in a corporate reorganization or a donee, are dealt with, and the objections that have been urged under the 5th and 16th amendments are examined and answered by reference to pertinent decisions.

The author points out that the decisions indicate that gross income (but not gross receipts) may be taxed under the income tax amendment, but he struggles, as many others have struggled, to reconcile the holding that depletion need not be allowed as a deduction from gross income, with holdings that capital investment must be returned before taxable gain arises.

The work is not wholly confined to a discussion of statutes and cases but contains independent expressions of opinion and suggestions for new legislation. Part of the background lies in Mr. Magill's participation in the drafting of the Revenue Acts of 1924 and 1934 and in his extensive investigation of the British income tax law and its administration. Interest in them should be heightened by the author's recent appointment as Under Secretary of the Treasury.

The suggestion that an annuity is income is not likely to meet with general assent. Nor will the view that because of its resemblance to a partnership a family may be taxed as a unit and in a higher bracket than the income of its individual members would find. In the one case the property or the activity producing the income is a joint ownership and venture, while in the other it is not so either in a legal or in an economic sense. The inventorying of securities, the lengthening of the period for assessing additional taxes, and the making of returns by independent auditors to obviate the need of field audits by revenue agents are suggestions the fulfillment of which would greatly facilitate the Bureau's tax collections and field work, but one may expect taxpayer opposition to changes in those directions.

The author points out that while capital gains on investments are not income under the British system, any gain is income if the transaction that creates it, even if it be a single deal, is in the nature of trading—or, in the words of a Scottish court quoted in Mr. Magill's *A Summary of the British Tax System,* "A single plunge may be enough provided that the plunge is made in the waters of trade." It would seem that the test of taxability under the British law of what we know as capital gains bears some analogy to the deductibility under our own revenue acts of expenses incurred in a "trade or business."

The book is not only excellent reading for any one interested in problems of income taxation, be he professional specialist or layman, but is particularly helpful to the lawyer because of its clear and comprehensive analysis of the principles upon which the judicial conclusions rest and its revelation of the consonance—or the conflict, as the case may be—between one group of decisions and another.

G. AARON YOUNGQUIST.

Minneapolis.

Le Droit Chinois, (Conception et evolution, Institutions legislatives et judicaires, Science et enseignement), by Jean Escarra. 1936. Peiping, China: Henri Vetch. 574 pp. The name of Dr. Jean Escarra is in itself sufficient recommendation for this most recent book on Chinese law. M. Escarra has devoted fifteen years of his life to the task of advising the government of China in regard to the reorganization of their legal institutions as well as holding a chair in the University of Paris in the faculty of law and acting also as chairman of the Institute of Chinese Studies at the same center of learning.

The author shows in the first part of this book the differences between Oriental and Occidental law and discusses the Chinese conception of law in a more thorough manner than is found in Wigmore's *Legal Systems of the World.* The point is made clear that the main principle of Chinese thought in general and Chinese law in particular is the belief in the close relationship between natural order and social order, a concept foreign to Western thinking, especially in political and legal philosophies. M. Escarra develops this part of his book with especial clarity, using Chinese as well as Occidental sources. This section concludes

with a brilliant description of the "Spirit of Chinese Law."

The second part of this study deals with legislative institutions which serves as a valuable background for the investigation of modern legal objectives and organizations in republican China. Part three considers the composition of the judicial services; part four pictures the character and extent of the educational institutions offering legal subjects, and part five is a succinct summary of the contemporary Chinese conception of law and the methodology used in teaching this subject.

This review cannot portray the genuine value of this book as a whole nor give an adequate presentation of the unique and critical bibliography which is the most complete source material published thus far on Chinese law. No one for years to come will have the temerity to embark upon such a stupendous project as M. Escarra now furnishes to students of legal history.

THOMAS E. ENNIS.

West Virginia University.

L'Exécution des Sentences Internationales, by Edvard Hambro. 1936. Paris: Librairie du Recueil Sirey. Pp. 148. This is a valuable study of the execution of international arbitral awards, covering the period from 1916 to 1923. The author examines all the cases (20 altogether) in which the validity of an award was contested by the losing party, was never executed or executed only after long delay, or in which the award was obscure and had to be resubmitted to the same tribunal or another tribunal for interpretation. He finds only one case in all the hundreds that have been submitted to arbitration in which the losing party ever deliberately refused to execute an award against it. This was the case of *Nicaragua v. Costa Rica and Salvador* (1916) where Nicaragua refused to execute a decision of the Central American Court of International Justice.

Starting with the assumption resulting from international law, or expressly or by implication from the terms of the arbitral agreement, that an award is final and binds the parties, the author examines the question whether this obligation applies only to awards which are valid; in other words, whether the losing party is under any obligation to execute an award which is invalid. An invalid award may result from a variety of causes: an invalid *compromis,* incompetence or excess of jurisdiction on the part of the tribunal, errors of fact or law, fraud, corruption of the arbitrators, etc. Cases involving all these grounds of nullity have not been lacking. Assuming that such an award is not binding, we are face to face with the difficult question as to how may the fact of invalidity be determined. Generally, tribunals of arbitration will not grant rehearings, and in case they were willing to do so they would not be competent judges of the invalidity of their own decisions. As yet there are no superior international courts with jurisdiction to hear appeals and review the decisions of arbitral tribunals. Must it be admitted then that the losing party is a competent judge of the validity of an award with which it is dissatisfied and against which it protests? Manifestly no, because this would violate a fundamental principle, which is as applicable in international law as in municipal law, that a party is never a competent judge in his own case.

Mr. Hambro's conclusion is that the principle of the invalidity of an arbitral award must be rejected until a tribunal of review has been established with competent jurisdiction to decide the question of validity. In short, no award can be recognized as invalid and therefore not binding unless it has been so declared by a competent tribunal of appeal. Admitting that this conclusion is contrary to the prevailing doctrine and practice, he argues that it is essential to the stability of international relations and international justice. If it be admitted that the losing party itself is the judge, arbitral awards would have little value and states would hesitate to have recourse to arbitration, knowing that any dissatisfied party would be free to deny the validity of an award and relieve itself of the duty of performance.

M. Castberg, a distinguished Norwegian jurist, reached essentially the same conclusion in his lectures on "Excess of Jurisdiction in International Justice" before the Hague Academy of International Law in 1931 (35 *Recueil des Cours,* especially pp. 422 and 438). Lammasch had already arrived at the same conclusion (*Die Rechtskraft Internationaler* Scheidsprüche, 1913, p. 149). Professor Borel, himself an experienced arbitrator, in his lectures on "Recourse Against Arbitral Awards" before the Hague Academy in 1932 (52 *Recueil des Cours,* pp. 5 ff.) dwelt upon the manifestly unsatisfactory present situation in which there is no appeal from an award the validity of which one of the parties contests and perhaps with justifiable reasons. In his opinion about as practicable a solution of the problem as can now be found is for states which desire to have recourse to arbitration, to provide in their arbitral agreements that whenever one of the parties denies the validity of an award the question shall be submitted for determination to the Permanent Court of International Justice or to some other tribunal which they may agree upon. A few such bilateral treaties have in fact been concluded.

JAMES W. GARNER.

University of Illinois.

Neutrality and Collective Security, by Sir Alfred Zimmern, William E. Dodd, Charles Warren, and Edwin DeWitt Dickinson. 1936. University of Chicago Press.—For all those who are discouraged by the present aspect of world affairs this book is recommended as a tonic of cheer. Not that it is brimful of optimism but it does contain a large measure of hope to serve as an antidote to the numerous contemporary counsels of despair. The volume consists of the lectures given before the annual Institute of the Harris Foundation last summer at the University of Chicago; each of the four distinguished contributors has definite proposals to make for the amelioration of the sad state of international relations.

Sir Alfred Zimmern, discussing the problem of collective security, believes that the so-called "welfare nations," that is, those states whose governments are concerned primarily with improving the lot of their citizens, should join together as a bloc to oppose those nations whose chief concern is "power politics," namely, the "Unholy Trinity" of Germany, Italy and Japan. Sir Alfred sagely eschews any grandiose scheme for League reform and universal sanctions, holding that the obvious mutuality of interests is a sufficiently cohesive factor to bind the "welfare" group together. This bloc should, he believes, organize its own economic and cultural life, refusing to make any concessions to the power-maniacs and confining all relations with the latter to a minimum. Such a policy, according to the author, would require "just a very

little increase" in our sense of world responsibility, would freeze the potential peace-breakers into abject submission, and would necessitate no elaborate machinery for its inauguration and maintenance. Resolute Sir Alfred is against the thesis that Germany, Italy and Japan are "Have-Nots" who need to be placated.

It is all very simple, too simple. Sir Alfred does admit that it is not strictly a fight between the angels and the devils, conceding that the Anglo-American-French-Soviet-Scandinavian, etc., halo may be a bit tarnished in some respects, but on the whole does call for a crusade against the "bad boys." Do not the "good" boys, however, have to share some of the responsibility for making the "bad" ones "bad," e. g., the "Treaty of Versailles"? Is "firmness in the right" entirely incompatible with some concessions? One does not have to agree with Sir Alfred's thesis in its entirety, however, in order to admit that it is a stimulating one and a hopeful one in an era when too many liberals have given up the cause for international order and reason.

Mr. Charles Warren, who has preached so much good sense in recent years in regard to the problem of American neutrality, goes ahead in this address to analyze the opposition in the last Congress to the Administration's proposed neutrality measure. It is a lucid analysis of the vexing neutrality issue, replete with specific suggestions of a constructive nature; his essay should prove invaluable to anyone seeking a compact survey of our neutrality position at the opening of the current Congress. At the conclusion of his story of America's attempt to stay aloof from war through new neutrality legislation, he pertinently states that "in a neighborhood of highly inflammable buildings, to rely on the supposedly fireproof quality of one's own house, and to make no effort to prevent a conflagration starting, is a dangerous means of trying to 'play safe.'" Mr. Warren knows what he is talking about. He was Assistant Attorney General in charge of neutrality cases before we gave up trying to be neutral in 1917.

In his section on "The Dilemma of Modern Civilization," Ambassador Dodd sums up his thoughts in his closing remarks when he asks, "Is it not possible for universities . . . newspapers and high school teachers so to teach and work as to rescue civilization from another world war and give urban proletariats a chance to live . . . ? Freer commerce, regulated industry, redistribution of populations, and abandonment of war are the major items in any system of recovery for our generation."

The concluding article in this collection is written by Professor Dickinson of the University of California who believes that an "appraisal of an American attitude toward the problems of orderly adjustment should provide no occasion for pessimistic inferences. There is no evidence that we are more selfish or more short-sighted than other peoples. . . . The United States is in no mood to incumber itself in advance with entangling political commitments; but it is committed by tradition, interest and recent conduct to a substantial participation in the development of . . . processes of orderely adjustment. . . ."

One need not be as sanguine as is Professor Dickinson concerning our willingness to assume our share of responsibility for the maintenance and growth of instruments of "orderly adjustment" in order to affirm that he has sounded a timely note of warning against those who tend to deprecate too greatly our alleged backwardness. Though perhaps too optimistic himself, he nevertheless raises a welcome banner of hope.

The appendices to this volume remain to be mentioned, for they contain a highly valuable collection of documents relating to sanctions, the League and the Italo-Ethiopian affair, and American neutrality. They alone make the book worth owning.

PAYSON S. WILD, JR.

Harvard University.

Leading Articles in Current Legal Periodicals, with Summaries of Interest to the Practicing Lawyer

The summaries of certain articles which follow are presented for the purpose of calling attention to contributions which apparently contain material of practical interest to the profession. In case the reader desires a copy of any of the magazines in which the articles appear, he is asked to write the publication directly. He will find the address in the summary.

FORECLOSURE SALES

"THE economic depression has focused the attention of thoughtful persons upon the problems relating to foreclosure sales." This is a subject upon which it is easy to become emotional. The practicing lawyer, however, is interested in such concrete problems as the considerations which lead a court of equity to confirm or refuse to confirm a foreclosure sale. "Nearly all jurisdictions are agreed that the confirmation of a foreclosure sale lies within the sound discretion of the court and that this discretion is not subject to review unless it has been abused." What then "do courts of equity mean when they say that inadequacy of the price bid at the foreclosure sale is not alone a sufficient reason for refusing to confirm the sale but where the price bid is so grossly inadequate as to raise a presumption of fraud, confirmation will be denied?" "Briefly stated, the argument generally advanced by the mortgagor in support of the contention that a resale should be decreed, is that it should be ordered in the hope or belief that economic conditions will have improved sufficiently by the time the resale occurs so that more favorable bids will be received for the property." "If the object of the sale is to pay the debt, does it make any difference whether the high bidder is the mortgagee or a stranger?" What is the situation where the mortgage contains a power of sale, or a deed of trust was given? A discussion of these matters, well documented with judicial decisions, is found in *A Study of Some of the Problems Concerning Foreclosure Sales and Deficiency Judgments*, by J. Louis Warm, in the December, 1936, issue of Brooklyn Law Review.

PLEADING

The problems of pleading under the codes revolve around the principle of the codes that the pleader shall state facts, "the whole facts, and nothing but the facts." In trying to conform to this primary, and seemingly sim-

ple, mandate, the practicing lawyer encounters numerous and perplexing difficulties in applying the principle to the facts of his client's case. These perplexities are occasioned, in no slight measure if not fundamentally, by want of appreciation and exploration of the *assumptions as to what facts are* which underlie the code provision that "every pleading shall contain a plain and concise statement of the material facts, without unnecessary repetition, on which the party pleading relies, but not the evidence." For a trenchant analysis of these assumptions, the practitioner will do well to read *"Facts" and "Statements of Fact"* by Walter Wheeler Cook, in the February, 1937, issue of The University of Chicago Law Review. To continue on this same subject, it might be remarked that one, if not the chief, cause of slovenly pleading is want of understanding by practitioners of the historical background against which their work must be done. In this background are found the pleading precedents to which reference constantly is made in judicial construction of pleadings and in the interpretation of codes of procedure. Moreover, the substantive law of today, as well as of yesterday, developed in the interstices of these procedural forms. The lawyer who would like to read a summary of the old system and "its prepossessions" and the new system and its endeavors to achieve "a system emancipated, on the one hand, from the artificialities of the common law and, on the other, from the prolixity of chancery," is referred to *The Old Régime and the New in Civil Procedure*, by Robert Wyness Millar, in the November, 1936, and January, 1937, issues of New York University Law Quarterly Review (New York City).

DIVORCE

A woman procures a divorce and later acquires a second husband. Still later the second husband becomes dissatisfied and, seeking "an easy way out of an unsatisfactory marital relationship," asks an annulment on the ground that the wife's decree of divorce from her first husband is invalid. He conceives of this move as "highly advantageous from a financial standpoint because, in the absence of express statutes, no property interests are acquired in his estate." He may make his attempt in the jurisdiction where the divorce was granted or in another jurisdiction, upon non-jurisdictional grounds, such as fraud, duress, collusion, or perjury, or upon jurisdictional grounds. What are his chances of success? Are they better in the jurisdiction where the divorce was granted or in another jurisdiction? It might seem that there should be no difference, "on the theory that a divorce is always good or always bad. This, it is submitted, is incorrect. Just as the law of property recognizes the doctrine of the relativity of estates, so we suggest a doctrine of the relativity of divorces." (For more on the "relativity of divorces," see "The American Law Institute vs. The Supreme Court, In the Matter of Haddock v. Haddock," by Joseph W. Bingham, in the April, 1936, issue of Cornell Law Quarterly.) The matter is "of considerable importance. Some 200,000 divorces are issued in the United States each year. Many of the 400,000 persons involved, about one-third, relying on the validity of the divorce, purport to marry again." Here is a problem which the lawyer may face tomorrow in his own office. Help may be had on it from *Attack on Decrees of Divorce by Second Spouses*, by Albert C. Jacobs, in the February, 1937, issue of The North Carolina Law Review (Chapel Hill, N. C.).

TAXATION

Can a decedent have had two domiciles for purposes of inheritance taxation? Two states have thus far successfully maintained that one decedent was domiciled in each of them. See: *Dorrance's Estate*, 309 Pa. 151, 163 Atl. 303 (1932), certiorari denied 287 U. S. 660 (1932), 288 U. S. 617 (1933); *In re Dorrance's Estate*, 115 N. J. Eq. 268, 170 Atl. 601 (1934), 116 N. J. Eq. 204, 172 Atl. 503, 184 Atl. 743 (1934-6), certiorari denied 56 Sup. Ct. 949 (1936); and see also on the same estate *Hill v. Martin*, 296 U. S. 393 (1935). With such a result possible, it is in order to re-canvass domicile and situs with respect to taxation of real property and of personal property both tangible and intangible, and with respect to excise and income taxes. Multiple taxation meets with judicial disfavor, but what happens when a non-citizen not domiciled within the United States is involved? A glance over the subject can be had by reading *Domicile Versus Situs as the Basis of Tax Jurisdiction*, by Robert C. Brown, in the December, 1936, issue of Indiana Law Journal (Indianapolis). Further on the question of taxes, let us suppose that in one year a taxpayer deducts, in respect of a certain other tax, an amount from his federal income tax. In a subsequent year, he receives a refund in respect of the tax for which deduction was made. Should the taxpayer treat this refund as additional income for the year in which it is made, or should he pay an additional tax for the year in which he erroneously made the deduction? And let us suppose that in one year the taxpayer deducts from his federal income tax too large an amount in respect of a certain other tax. In a later year it is determined that he shall pay an additional assessment on account of the excess deduction. Shall this additional assessment be computed as of the year when the deduction was made or as of the later year when it is determined that payment shall be made? Either situation can be complicated by the fact that the rate is higher or lower in the second than in the first year, and further complicated by the effect of the statute of limitation. For a discussion, see *The Treatment for Federal Income Tax Purposes of Errors in the Deduction of Other Taxes*, by Robert C. Brown, in the February, 1937, issue of University of Pennsylvania Law Review (Philadelphia, Pa.).

THE ROBINSON-PATMAN ACT

"Two concepts are essential to a clear understanding of the nature of this law—discrimination and competition." "As has been pointed out, the purpose of the anti-trust laws is to protect competition." "The concern of the law is not with discrimination *per se*, but only with discrimination which results in an impairment of competitive power." "The most important affirmative defense under this law is contained in the provision that permits differentials in price which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities of sale." "In considering the effect of the act upon existing contracts to sell, a very nice problem is presented." "One of the most keenly mooted questions arising under the law is whether or not it prohibits the basing point method of pricing." "It is clearly both the intent and effect of this section to make the one who receives a discrimination equally guilty with the one who grants it." "It should be apparent from the foregoing discussion that the Robinson-Patman Act, although poorly drafted and carelessly enacted, does not work a sweeping change in that part of the anti-trust law which relates to price discrimination. At most it makes articulate and emphasizes interpretations and developments under the former law." The foregoing and other aspects of this legislation are discussed in *A Second Attack on Price Discrimination: The Robinson-Patman Act*, by Milo Fowler Hamilton and Lee Loevinger, in the February, 1937, issue of Washington University Law Quarterly (St. Louis, Mo.).

BANKRUPTCY

The board of directors of a corporation desires to make use of the Bankruptcy Act; no act of bankruptcy has been committed; shall the board proceed to institute voluntary proceedings or shall it make an admission in writing that the corporation is unable to pay its debts? Is the consent of the stockholders, under most statutes, necessary before either of these two courses can be followed? In a note in 50 Harvard Law Review 662 under the title *"Power of Directors to Institute Bankruptcy Proceedings*

Without Stockholders' Consent" a new departure in argument supporting the action of directors in following either of these two courses is presented by the analysis there set forth of the reasoning of the court in Royal Indemnity Co. v. American Bond & Mortgage Co., 289 U. S. 165 (1933). It was there pointed out "that the assets were transferred not by the petition but by the adjudication, and that the latter was the act of the court." For the possible implications of this decision as affecting the actions of directors and the future decisions on similar questions an examination of this note would be well worth while. (Harvard L. R. Cambridge, Mass.)

TRUSTS

A trustee is forced to foreclose a mortgage and to bid in the property on behalf of the trust. Later he sells it; are the expenses of foreclosure, taxes and other carrying charges to be currently met from the general income of the trust or from principal; are they to be permanently charged to principal or income? These and other problems presented by this set of facts are discussed as well as the problems presented by the situation where the property is rendered productive, or where a trust company has organized a corporation to take title to the property and has issued shares to the various trust estates and the same subsequent events take place, in an article in 37 Columbia L. R. 61 by Harold C. Vaughan. The author has "considered all the New York decisions on the subject" and presents the conclusions to be drawn therefrom in a most interesting and lucid manner. (Columbia L. R. New York City.)

The National Railroad Adjustment Board: A Unique Administrative Agency, by Lloyd K. Garrison, in Yale Law Journal (Feb.), gives a description of this quasi-judicial body, from both a factual and a human standpoint, setting forth briefly the developments and enactments which led to its creation, what it is, its powers, and the manner in which it functions. The National Railroad Adjustment Board deals with relations between labor and management—a question of particular moment—and directly concerns the lives of three million people in our country. It is not a quickly-trumped-up agency, but has developed over a period of years, and has many unusually interesting aspects to its procedure. The article of Dean Garrison, who is an authority on the subject, explains it fully and entertainingly. (Yale L. J., New Haven, Conn.)

American Journal of International Law, January (Washington, D. C.)—The Fifteenth Year of the Permanent Court of International Justice, by Manley O. Hudson; The United States and the Rights of Neutrals, 1917-1918, by Alice M. Morrisey; The Convention of 1936 for the Suppression of the Illicit Traffic in Dangerous Drugs, by J. G. Starke; Rectification of the Rio Grande in the El Paso Juarez Valley, by G. Frederick Reinhardt; International Cooperation of the U. S. S. R. in Legal Matters, by T. A. Taracouzio.

Dickinson Law Review, January (Carlisle, Pa.)—Mortgage Deficiency Judgment Acts and Their Constitutionality, by D. J. Farage; Considerations Regarding the Late Deficiency Judgment Acts, by Frederick C. Fiechter, Jr.; Review of Agreements and Awards and Setting Aside of Final Receipts Under the Workmen's Compensation Act, by S. H. Torchia; The Elder Brewster of Pennsylvania, by Lewis C. Cassidy.

Fordham Law Review, January (New York City)—Legal Aspects of Low-Rent Housing in New York, by E. H. Foley, Jr.; Provablity of Contingent Claims in Bankruptcy, by Eugene J. Keefe; Felony Murder in New York, by Thomas L. J. Corcoran; More Functional Nonsense—A Reply to Felix S. Cohen, by Walter B. Kennedy.

Georgetown Law Journal, January (Washington, D. C.)—Legal Controls of Corporate Promoters' Profits, by Carl McGowan; Penal Ordinances and the Guarantee Against Double Jeopardy, by J. A. C. Grant; Legislative Power Versus Delegated Legislative Power, by O. Douglas Weeks; Law Teaching and Pragmatism, by Carl C. Wheaton; Rights and Liabilities of the Infant Partner—Application of Basic Contract Principles, by Dale E. Bennett.

Illinois Law Review, January (Chicago, Ill.)—Corporate Taxpayers and the Equal Protection Clause, by John B. Sholley; The Fortunes of the Demurrer, by Robert Wyness Millar.

Kansas City Law Review, February (Kansas City, Mo.)—A Discussion of the Missouri Declaratory Judgments Act, by Milo Fowler Hamilton, George L. Gisler, Paul J. Parker, James A. Moore, J. Gordon Siddens, Everett A. TenBrook, Charles J. Winger, Elliot Norquist and William H. Hoffstot, Jr. (Compiled by Lee Reeder); Proximate and Remote Case, by Nicholas St. John Green.

Kentucky Law Journal, January (Lexington, Ky.)—Conditional Sales in Kentucky, by W. Lewis Roberts; Injunctions in Federal Tax Cases with Special reference to the Windfall Tax, by Lawrence Broh-Kahn; Divisibility of Covenants in Oil and Gas Leases, by Hiram H. Lesar.

Law Quarterly Review, January (Toronto)—Some Reflections on the Case of Re Chardon, by William O. Hart; The Inter-Relation of the Legal Systems of Scotland and England, by Prof. A. D. Gibb; The Rule of Law and the American Revolution, by R. A. Humphreys; Trial by Jury in Modern Continental Criminal Law, by Hermann Mannheim; Bell v. Lever Bros., by C. J. Hamson.

Maryland Law Review, December (Baltimore, Md.)—Latent Equities in Maryland, by Charles G. Page; Revocation of a Will by Birth of a Child, by William Lentz.

Michigan Law Review, February (Ann Arbor, Mich.)—The Notice Due to a Guarantor, by Morton C. Campbell; The Proposed United States Administrative Court: II by Robert M. Cooper; Stockholders' Suits: A Possible Substitute, by Harris Berlak.

Journal of National Association of Referees in Bankruptcy, January (Winona, Minn.)—Proceeedings of Detroit, 1936, Conference (Concluded); Addresses of Circuit Judge Charles C. Simons; Circuit Judge Florence Allen; Composition, Extensions and Arrangements—Partnership Bankruptcies; by Jacob I. Weinstein; Preferential and Fraudulent Transfers, by Prof. James A. McLaughlin.

New York University Law Quarterly Review, January (New York City)—The General Powers and Relations of Co-Executors, by Alvin E. Evans; Conditional Estates and Covenants Running with the Land, by William F. Walsh; The Old Regime and the New in Civil Procedure II, by Robert Wyness Millar.

Oregon Law Review, December (Eugene, Oregon)—Democratic Government's Struggle for Survival, by Robert F. Maguire; No Man's Land and the Constitution, by Arthur M. Cathcart; Administrative Law and Procedure—A Symposium, by McDannel Brown, Kenneth J. O'Connell; J. P. Newell; Frank C. McColloch, Allan Hart.

Rocky Mountain Law Review, December (Boulder, Col.)—The Future Work of the Association of American Law Schools, by George G. Bogert; Streams of Strife, by Gilbert Cosulich; The Discharge of Contracts, by Roy Earnest Bennett.

Tennessee Law Review, February (Knoxville, Tenn.)—Some Suggested Legislation in the Field of Wills, by W. Raymond Blackard; The Separation of Powers, by Stuart A. MacCorkle; Reorganization of County Government Upon Council-Manager Plan, by Estes Kefauver; Admission to the Bar in Tennessee, by J. Pike Powers, Jr.; What Is Legal Education, by Henry B. Witham; The Missouri Rule as to Regulation of the Bar, by Frank E. Atwood; Courts and the Rule-Making Powers, by Carl C. Wheaton; The Junior Section of the Bar Association,

by R. B. C. Howell, Jr.; A Note for Future Rent, by W. Raymond Blackard.

Virginia Law Review, February (Charlottesville, Va.)—Essentials of Bankruptcy: Prevention of Fraud, and Control of Debtor, by Garrard Glenn; The Legal Position of English Protestant Dissenters, 1689-1767, by Charles F. Mullett; The Effect in Virginia of Conviction of Crime on Competency and Credibility of Witnesses, by D. W. Woodbridge.

United States Law Review, January (New York City)—Some Aspects of Federal Jurisdiction, by Grover M. Moscowitz; Personal Life Insurance Trusts, by Albert Epstein.

Harvard Law Review, February (Cambridge, Mass.)—Fifty Years of Jurisprudence, by Roscoe Pound; Changes in the Administration of Criminal Justice during the past Fifty Years, by Sam B. Warner and Henry B. Cabot; The Substantive Law of Crimes—1887-1936, by Livingston Hall.

North Carolina Law Review, February (Chapel Hill, N. C.)—The Law of Arrest in North Carolina, by Albert Coates; Attack on Decrees of Divorce by Second Spouses, by Albert C. Jacobs; The Reformation of Writings Under the Law of North Carolina, by Wex S. Malone.

University of Pennsylvania Law Review, February (Philadelphia, Pa.)—William Henry Lloyd, by Layton B. Register; International Cooperation for Neutrality, by Charles Cheney Hyde; Pennsylvania Rules Governing the Allocation of Receipts Derived by Trustees from Shares of Stock, by Robert Brigham; The Treatment for Federal Income Tax Purposes of Errors in the Deduction of Other Taxes, by Robert C. Brown.

Washington University Law Quarterly, February (St. Louis, Mo.)—A Second Attack on Price Discrimination: The Robinson-Patman Act, by Milo Fowler Hamilton and Lee Loevinger; From Common Law Rules to Rules of Court, by Laurance M. Hyde; Constitution-Making in 1935-36, by Hugh Evander Willis.

The Yale Law Journal, February (New Haven, Conn.)—The National Railroad Adjustment Board: A Unique Administrative Agency, by Lloyd K. Garrison; National-State Cooperation—Its Present Possibilities, by Edward S. Corwin.

Legal Ethics and Professional Discipline

Service by Publication in Disbarment Suits

IN order to overcome a handicap that it has experienced in disbarment suits when it is unable to obtain service when the respondent has fled from the county, the Cleveland Bar Association has asked the legislature to enact legislation authorizing service by publication in such proceedings when it is made to appear to the court by affidavit or otherwise that the attorney has departed from the county of his residence, or that his residence is unknown and can not with reasonable diligence be ascertained, or keeps himself concealed. This legislation was prepared by the Committee on Grievances made up of Herman H. David, Chairman; Howard L. Hyde, Charles O. Chandler, George Tenesy, and Leonard Davis.

Attorney May Prosecute Suit to Judgment to Protect His Lien

In an original proceedings brought in the Supreme Court of Utah (Jeffries v. Third Judicial District Court of Salt Lake County, 63 Pac. (2d) 242), the plaintiff sought to review the proceedings of the District Court in rendering a judgment against him in favor of one Donovich for the use and benefit of Donovich's attorney. In the lower court Donovich had brought an action against Jeffries claiming wages as a miner in the sum of $250. Donovich, it was alleged, had agreed to pay his attorney a fee equal to one-half of his claim against Jeffries.

Without the knowledge of Donovich's attorney, a settlement was reached in the case whereby Jeffries agreed to pay Donovich $107.50 and also to pay his attorney's fee. The Court entered a judgment in the case for $125 "for the use and benefit of plaintiff's attorney." In upholding the decision of the District Court, the Court quoted a Utah statute and said: "In construing this statute, this court, through a long line of cases, has repeatedly held that an attorney may prosecute his client's cause of action to judgment and in his client's name, solely for the purpose of protecting his lien for the amount of his fee in the case, and that his lien may not be defeated by a settlement effected without his consent."

Divorce Advertising in Florida

In a unique proceeding (Givens v. Tampa Bar Association, et al, 169 Southern 744) Morris M. Givens, a Florida lawyer, filed a suit in chancery in the Circuit Court of Hillsborough County, praying "that he be, under an order of this Court, authorized and permitted to advertise with the local, state, national and foreign press, periodicals, radio chains and 'what have you' whatsoever virtue in legal lore, learning and facility petitioner may possess." The petitioner also asked an injunction against all and sundry, restraining them from preferring any charges against him for disbarment on the ground of advertising. In his petition he sets out a provision of the Florida statutes prohibiting the publication of any notice or advertisement relating to the procuring of divorces "unless and until the person, firm, or association so publishing said advertisement or notice shall sign in full his name or the name of one or more members of the firm publishing such advertisement and unless and until he or they so publishing said advertisement or notice be duly licensed members of the bar authorized to practice in the Circuit Courts of the State of Florida."

In affirming the order of the Circuit Court dismissing the bill, Judge Buford of the Supreme Court stated that the statute eliminated from its operation licensed members of the bar but did not purport to authorize them to advertise for or solicit divorce practice, and that it was evident the legislature recognized the inherent right of the courts to regulate the conduct of the members of the bar and was merely seeking to protect them and the courts from the imposition of those who might attempt, without authority, to practice "divorce law."

Attorney Making False Representations Held Guilty of Contempt

Where an attorney at law falsely purported to be the authorized attorney of a taxpayers association and of certain protesting taxpayers and, as such, procured the signature of the district judge to a journal entry of judgment in a tax protest case which recited that he, as attorney, was entitled to personally receive from the funds recovered in the action the sum of $9,795.66, he thereby committed an act calculated to obstruct the court in the administration of justice. Subsequently a formal complaint was filed against him in the trial court, he appeared and was adjudged guilty of contempt and sentenced to three months in the county jail. This judgment was affirmed by the Supreme Court of Oklahoma in the case of Brown v. State, 62 Pac. 2d 1208.

Delinquent Attorney May Recover for Services

In the case of Niemeier v. Rosenbaum, Supreme Court of Washington, 63 Pac. (2d) 424, it was held that the failure of an attorney to pay registration fees at the time services were rendered will not preclude him from maintaining an action for services. It will be noted that this decision was in an integrated bar state where attorneys are required to pay an annual registration fee.

"The Quality of Mercy--"

An attorney, employed by a client to recover certain funds from the estate of an intestate, was unsuccessful in the lower court. Subsequently he made a compromise by which his client was treated as one of the heirs to the estate and received in her behalf the sum of $956.22. He notified her that a settlement had been made and when she came into his office he paid her $100.00 in cash, satisfied the cost of the judgment against her in the lower court for $52.60, and agreed to take care of the fees of a witness subpoenaed on her behalf. But he failed to notify her of the amount he had received in settlement of the case. His fee contract had provided that he would be entitled to one-third of the amount recovered. The trial committee made no finding as to whether the accused attorney was entitled to a fee, and, if so, the amount thereof. It did find him guilty of unprofessional conduct in not making a full disclosure to his client.

On these facts, the Board of Governors of the Oregon State Bar recommended suspension for six months. In reprimanding the petitioner and placing him on probation for one year, the Court said: "It appears that petitioner has been a practicing lawyer for forty-seven years, and that heretofore he has borne an honorable reputation; that no complaint has ever been made, before the instant one, to any grievance committee for misconduct as an attorney or for unprofessional conduct." Two members of the Court dissented.—In re Boothe, Supreme Court of Oregon, 63 Pac. 2d 905.

Two Bad Checks—Suspension for One Year

The respondent gave two checks upon accounts which had been closed for some time. These checks were not made good until after the matters had been brought to the attention of the bar association. He was suspended for one year by the Appellate Division of the Supreme Court, First Department.—In re de Acosta, 291 N.Y.S. 853.

Negligence May Constitute Moral Turpitude

Where an attorney was employed to procure a divorce and by mistake failed to file the original complaint and did not file it until after an investigation of his conduct had commenced, three months after he discovered his original failure to file, and where he advised clients and other witnesses, who had been subpoenaed to appear before the local administrative committee of the bar association investigating charges against him, to ignore the subpoenas, he was held guilty of unprofessional conduct involving moral turpitude and was suspended for six months (Waterman v. State Bar of California, Supreme Court of California, 63 Pac. 2d 1133).

The Court said: "Gross carelessness and negligence constitute a violation of the oath of an attorney to 'faithfully discharge the duties of an attorney and counselor at law to the best of his knowledge and ability' (Code Civ. Proc. Sec. 278) and involve moral turpitude in that they are a breach of the fiduciary relation which binds 'him to the most conscientious fidelity.' . . . These facts disclose an habitual failure to give reasonable attention to the handling of the affairs of his clients rather than an isolated instance of carelessness followed by a firm determination to make amends. Under the circumstances, we do not feel that the recommended period of suspension is excessive."

Opinion on Advertising

The Committee on Professional Ethics of the Chicago Bar Association received an oral inquiry from a member of the Association, which inquiry is as follows:

"Is there any objection to a member stating on his professional card or letterhead 'member of Chicago Bar Association.'"

The Committee considered the matter and decided that the words "member of the Chicago Bar Association" upon a lawyer's professional card or letterhead are objectionable.

This decision was based on the fact that although only in a mild form, such an addition to the professional card or letterhead amounted to advertising. Further, that letterheads containing such printed matter might be used in writing to persons who would be subjected to improper influence by reason of reference to membership in the Association.

The Committee further felt that if this addition to a letterhead or professional card was not frowned upon, the door would be open to further additions of reference to membership in various organizations with resulting improper effect.—Chicago Bar Record.

London Letter

Judicial Salaries

A white paper recently issued authorizes the introduction of a bill to increase the statutory salaries of county court judges to £2,000 per annum and of the chief magistrate and magistrates of the metropolitan police courts to £2,300 and £2,000 per annum respectively. In 1865, by the County Courts Equitable Jurisdicion Act of that year, the salary of a county court judge was fixed at £1,500, and, ten years later, in accordance with the provisions of the Police Magistrates Metropolis (Salaries) Act, the salary of the chief magistrate was fixed at £1,800 and that of the other magistrates at £1,500.

Since 1919 the salaries of county court judges and magistrates have been increased by an additional payment, corresponding to the former civil service bonus, so that the present rate of remuneration amounts to £1,650 per annum in the case of county court judges and magistrates and £1,953 per annum in the case of the chief magistrate.

The memorandum states that an improvement in the remuneration of the county court judges and metropolitan police court magistrates has been in contemplation for several years owing to the change in their functions and in conditions since the time when their salaries were fixed. In recent years their duties have become much more arduous and responsible, and they are now of such a nature as to require men of very considerable experience and practice at the bar adequately to perform them. The aggregate cost to the country of the suggested increases will amount to approximately £35,000 a year.

In Scotland too the question of judicial salaries has been to the fore. In a written reply to a question in the House of Commons on the 17th November last, the Secretary of State for Scotland stated: "I propose forthwith to review the salaries of sheriffs and sheriffs-substitute in consultation with the treasury. I may add that legislation is not required for this purpose, as the salaries in question are not fixed by statute."

The salaries of sheriffs-substitute, who have unlimited jurisdiction in civil suits, and whose criminal work is constantly increasing, at present range from only £850 to £1,650 per annum, in spite of increases granted only a short time ago.

It may be that when these matters have received the favorable attention they deserve, some thought may be given to the very meagre emoluments enjoyed by the judges of the high court.

Sir Henry Curtis Bennett

Within three weeks of his appointment as chairman of the London Sessions, Sir Henry Curtis Bennett died suddenly on November 2nd. He was taken ill while speaking at a dinner at the Dorchester Hotel in London and, although everything possible was done by doctors who were present, he died soon afterwards. During Sir Henry's very successful career at the bar he appeared in many notable murder cases, among which may be mentioned the trials of Ronald True, Herbert Rowse Armstrong who was convicted of poisoning his wife with arsenic, Vaquier, and Field and Gray, who were condemned for the murder of Irene Munro.

Mr. Eustace Cecil Fulton has been appointed to succeed Sir Henry Curtis Bennett. Mr. Fulton was called to the Bar in 1904, at the Middle Temple and is the son of the late Sir Forest Fulton, K. C., a former recorder of London.

Inns of Court Treasurers

The Hon. Mr. Justice Clauson has been elected treasurer of Lincoln's Inn, Mr. Heber L. Hart, K. C., LL.D., has been elected treasurer of the Middle Temple, his Honour A. W. Bairstow, K.C., has been elected treasurer of the Inner Temple, and Lord Atkin has been elected treasurer of Gray's Inn for the ensuing year.

Mr. Justice Clauson has been a judge of the chancery division of the High Court of Justice since 1926, prior to which he enjoyed one of the leading practices at the chancery bar. Born on the 14th of January, 1870, he was educated at Merchant Taylors School and St. John's College, Oxford. He was called to the bar in 1891; became King's Counsel in 1910, and a bencher of his Inn in 1914.

Mr. Hart was called to the bar at the Middle Temple on the 26 of January, 1887; took silk in 1913, and became a Master of the Bench in 1923. In 1915 he was appointed recorder of Ipswitch, an appointment which he quite recently resigned. After the war he served as British member of the Anglo-German, Anglo-Austrian, Anglo-Bulgarian and Anglo-Hungarian Mixed Arbitral Tribunals established under the Treaties of Peace, until the completion of their work in 1931. Mr. Hart is a recognized authority on banking law, and his book on that subject, the fourth edition of which was published five years ago, is a standard work.

His Honor A. W. Bairstow, K.C., was a judge of county courts from 1918 to 1928. He was born in 1855, educated at Trinity Hall, Cambridge, was called to the bar at the Inner Temple in 1878, took silk in 1908, and became a bencher in 1915 in which year he was appointed solicitor-general of the County Palatine of Durham. He was also recorder of Scarborough from 1917 to 1918.

Lord Atkin has been a lord of appeal in Ordinary since 1928. He was born in 1867, educated at Christ College, Brecon and Magdalen College, Oxford, was called to the bar in 1891, became King's Counsel in 1906 and elected to the bench of his Inn in the same year. He was appointed judge of the High Court in 1913, and Lord Justice of Appeal in 1919. He was Judge of Munitions Tribunals Appeals Court from 1916 to 1919, and president of the Naturalisation of Aliens (Revocation) Committee, 1918-1919. He has also been chairman of many other committees, including the Termination of the War Committee, and the Committee on Crime and Insanity, 1924. He was created Baron Atkin of Aberdovey in 1928. This will be Lord Atkin's second term of office as treasurer of his Inn, his previous term was in 1914.

The Master Treasurers of the Inns of Court are usually elected to fill the office in order of seniority of call to the bench of their Inn and it is now the custom for the treasurer to hold office for one year. During that time he is the executive head of his Inn. Bar and, generally, exercises effective supervision of all things concerning his Inn.

Voluntary Euthanasia

A bill, introduced in the House of Lords this session by the Lord Ponsonby of Shulbrede but which was rejected on the movement for second reading by 35 votes to 14, gave rise to considerable discussion in the English press and elsewhere. Its title was the Voluntary Euthanasia (Legislation) Bill, by which it was proposed to give the choice of a painless death (under certain conditions) to persons suffering from incurable and fatal diseases involving severe pain. The conditions under which permission could be given to a medical practitioner, duly licensed for the purpose, to administer euthanasia were that the patient must not be under the age of twenty-one years; that he must be of sound mind, and that he must be suffering from illness involving severe pain and of an incurable and fatal character. The patient would have been obliged to make application in writing stating that he was so suffering and that he was desirous of anticipating death by euthanasia. The application would then have been forwarded to a euthanasia referee, appointed by the Minister of Health, together with two medical certificates, one by the patient's own medical attendant and the other by a medical practitioner having such qualifications as might be prescribed. These certificates were to state the name of the disease from which the patient was suffering, that the illness was of an incurable and fatal character and that the patient fully understood the nature and purpose of the application he was making. Before granting permission to receive euthanasia a referee was to satisfy himself, by a personal interview with the patient, that all these conditions had been fulfilled and that the patient fully understood the nature and purpose of the application.

It was provided in the Bill that euthanasia should be administered only by a medical practitioner licensed for the purpose and that it should be administered in the presence of an official witness. Also, for the purpose of the Coroners Act, 1889 a person receiving euthanasia should not be deemed to have died a violent or unnatural death.

The Bill also provided that the Minister of Health might make regulations for the issue of licenses to medical practitioners to administer euthanasia, prescribing the duties of and fees payable to a euthanasia referee, and the procedure to be followed in administering euthanasia, and for other purposes.

Although the bill had advocates outside as well as inside the House, the general feeling was well illustrated by Viscount Fitzalan when, in moving its rejection, he said "Instead of giving it a classical title he should have given it a good plain English one understandable by the people and called it, what it was, a bill to legalize murder and suicide. Euthanasia was contrary to the law of nature, which branded it as evil and a cowardly act. To allow sentiment to run away with us meant an abandonment of our principles. In this Bill they were asked to ignore the Almighty. Action of that kind partook of the nature of an impertinence which they would do well to avoid."

Marriage and Divorce

The new Marriage Bill, now before the House of Commons, has also been the subject of considerable comment. The memorandum issued with the bill states that its purpose is to strengthen the institution of marriage and increase respect for the law by amending the laws relating to marriage and divorce. It provides that no divorce shall be granted within five years of the date of marriage, but judicial separation and nullity remain available during that time. Grounds for divorce under the bill are adultery, desertion for a period of at least three years, cruelty, incurable insanity, habitual drunkenness, and imprisonment under a commuted death sentence. Judicial separation may be granted on any grounds on which a petition for divorce might have been presented, and it may be converted into divorce after two years, subject to the five years provision above noted. This, it is claimed, will provide a release from a state of life which, as a permanent state, was condemned by the Royal Commission on Divorce and Matrimonial Causes of 1912. It is also intended to abolish the decree nisi, which was instituted in 1860. Provision has been made in the bill "to enable those who cannot afford adequate professional assistance to bring their cases before selected justices in courts of summary jurisdiction, where they will have the advantages of the social services of the courts, including religious, legal and medical advice. The intention is to introduce the machinery of conciliation into the law of matrimonial causes concerning divorce and nullity: but the final jurisdiction in divorce and nullity is still reserved for the High Court." Clause 11 provides that no clergyman of the Church of England shall be compelled to re-marry divorced persons or to allow the use of his church for the purpose.

The bill has been received with considerable favor and it is believed that, with certain amendments, it is likely to pass into law.

A bill has also been introduced in the House of Lords providing additional grounds for divorce in Scotland. They follow closely those in the Marriage Bill noted above, but, in addition to the provision concerning imprisonment under a commuted death sentence, it is also provided that a decree may be granted if the defender has, since the date of the marriage and within five years immediately preceding the raising of the action for divorce, been convicted at least three times of a crime, and sentenced on any such conviction to imprisonment for a period of not less than six months. Unnatural offences by the husband, which have been a ground for divorce in England since 1857, but not in Scotland, have also been included.

Independence of Judges

A bill to safeguard the independence of the Judiciary was read a second time in the House of Lords on the 22nd of November last. This Bill is identical with that which passed through all its stages in the House of Lords in the last session, but which was dropped in the House of Commons. The preamble recites the expediency, in the interests of justice, that the traditional independence of judges should be confirmed and maintained. In moving the second reading Lord Rankeillour explained that the object of the measure was to make it clear that the position of the judges remained independent and not to be confounded with the civil service, as events in 1931 showed that it had been. The Marquess of Zetland said that the government keenly supported the object which the bill had in view. The bill provides that in any statute hereafter enacted no provision for the alteration or diminution of the rights, duties, salaries or emoluments of any persons which arise from the service of His Majesty or from the holding of any commission or office shall, unless expressly stated, be deemed to apply in the case of the holders or past holders of high judicial office whose salaries are charged on the Consolidated Fund.

S.

The Temple.

Preliminary Report of Special Committee on Judicial Salaries

INASMUCH as forty-three Legislatures are meeting the fore-part of 1937 it would seem the data being compiled by this Committee should be released now rather than to await the formal committee report in connection with the annual meeting.

From the inquiries received, it is evident that there is now a renewed interest on the part of our members as to the readjustment of judicial salaries. Some changes will doubtless be made before the Kansas City Convention but the existing schedules are presented for the purpose of comparison and for the guidance of all who are studying the situation.

SALARIES FOR STATE COURTS OF LAST RESORT

January 1, 1937

Alabama	$ 5,000.00	Nebraska	$ 7,500.00
Arizona	6,600.00	Nevada	7,500.00
Arkansas	7,000.00	New Hampshire	7,000.00
California	11,000.00	New Jersey	18,000.00
Colorado	5,000.00	New Mexico	6,000.00
Connecticut	10,330.00	New York	22,000.00
Delaware	1,000.00	North Carolina	8,000.00
Florida	9,600.00	North Dakota	5,000.00
Georgia	7,000.00	Ohio	12,000.00
Idaho	5,000.00	Oklahoma	5,000.00
Illinois	15,000.00	Oregon	7,500.00
Indiana	10,000.00	Pennsylvania	19,500.00
Iowa	7,500.00	Rhode Island	10,000.00
Kansas	6,000.00	South Carolina	7,500.00
Kentucky	5,000.00	South Dakota	4,800.00
Louisiana	10,000.00	Tennessee	7,500.00
Maine	8,000.00	Texas	6,500.00
Maryland	11,500.00	Utah	5,000.00
Massachusetts	14,000.00	Vermont	6,000.00
Michigan	12,000.00	Virginia	7,500.00
Minnesota	8,500.00	Washington	7,000.00
Missouri	7,500.00	West Virginia	10,000.00
Mississippi	7,500.00	Wisconsin	10,000.00
Montana	7,500.00	Wyoming	7,000.00

In California, Maine, Massachusetts, New Jersey and Rhode Island the Chief Justice receives an additional $1,000.00. In Connecticut, Delaware, Minnesota, New York, Ohio, Pennsylvania, Vermont, Virginia and Wisconsin the Chief Justice receives an additional $500.00.

SALARIES OF NISI PRIUS STATE COURTS

January 1, 1937

Alabama	$ 4,000	Nebraska	$4,000 to $ 5,000
Arizona	$3,000 to 4,400	Nevada	4,000 to 7,000
Arkansas	3,600	New Hampshire	7,000
California	4,500 to 10,000	New Jersey	16,000
Colorado	4,000	New Mexico	4,500
Connecticut	4,000 to 7,500	New York	15,000
Delaware	3,500 to 5,000	North Carolina	7,500
Florida	7,500	North Dakota	3,500
Georgia	5,000 to 9,000	Ohio	3,300 to 12,000
Idaho	4,000	Oklahoma	4,000
Illinois	4,500 to 6,000	Oregon	5,000 to 6,500
Indiana	4,800 to 10,600	Pennsylvania	10,000 to 18,000
Iowa	5,000	Rhode Island	9,500 to 10,500
Kansas	4,000	South Carolina	7,500
Kentucky	4,200	South Dakota	4,300
Louisiana	5,000 to 8,500	Tennessee	5,000
Maine	7,500	Texas	4,000
Maryland	8,500	Utah	4,000
Massachusetts	12,000	Vermont	5,000
Michigan	6,000 to 13,500	Virginia	4,500 to 7,500
Minnesota	6,000 to 7,500	Washington	4,500 to 6,000
Missouri	4,700 to 8,000	West Virginia	5,000
Mississippi	5,000	Wisconsin	8,000
Montana	4,800	Wyoming	6,500

In 17 states supplemental compensation to Judges is permitted by law if paid by the cities or counties in the circuit or district. In some states the Legislature has specified larger salaries for more populous counties.

Judicial Pensions

This subject is being considered in several states but as of the preparation of this report the states having judicial pension plans in force are: Arkansas, Connecticut, Florida, Illinois, Louisiana, Maine, Maryland, Massachusetts, Minnesota, New Jersey, New York, North Carolina, Pennsylvania, Rhode Island, Tennessee, Virginia and Wyoming.

WALTER S. FOSTER, Chairman.

Arrangements for Annual Meeting, Kansas City, Missouri

September 27—October 1, 1937

HEADQUARTERS:

MUNICIPAL AUDITORIUM

Hotel accommodations, all with bath, are available as follows:

	Single for one person	Double (Dble. bed for two persons)	Twin beds for two persons	Parlor Suites
	$	$	$	$
Aladdin	2.00 to 2.50	3.00 to 5.00	4.00 to 7.00	
Ambassador	3.00 to 4.50	5.00 to 8.00		
Baltimore	3.00 to 4.00	4.00 to 9.00	5.00	10
Bellerive		5.00	6.00	8 & up
Bray	2.00 to 3.00	3.00 to 5.00		
Commonwealth	2.50 to 3.00	4.00 to 5.00	5.00 to 6.00	8
Kansas Citian	2.50 to 3.00		3.50 to 6.00	10
Muehlebach	3.00 to 5.00	4.50 to 7.00	6.00 to 10.00	13 to 35
Phillips	3.50 to 4.00	5.00 to 7.00	6.00 to 8.00	8 to 15
Pickwick	3.00 to 4.00	4.00 to 5.00	5.00 to 6.00	
President	2.50 to 4.00	3.50 to 5.00	4.50	
Robert E. Lee	1.50 to 2.50	2.50 to 3.50	3.50 to 4.00	
Savoy	2.50	5.00		6 to 12
Sexton	2.00	3.00	5.00	
Stats	2.50 to 3.50	3.50 to 5.00	6.00 to 7.50	
Westgate	1.50 to 2.50	2.50 to 3.50		

Explanation of Type of Rooms

A single room contains either a single or double bed to be occupied by *one person*. A double room contains a double bed to be occupied by *two* persons.

A twin-bed room contains two beds to be occupied by two persons. A twin-bed room will not be assigned for occupancy by one person.

A parlor suite consists of parlor and communicating bedroom containing double or twin beds. Additional bedrooms may be had in connection with parlor.

To avoid unnecessary correspondence, members are requested to be specific in making requests for reservations, stating hotel desired, number of rooms required and rate therefor, names of persons who will occupy the same, and arrival date, including definite information as to whether such arrival will be in the morning or evening.

Requests for reservations should be addressed to the Executive Secretary, 1140 North Dearborn Street, Chicago, Illinois.

List of Cases Citing the Restatement of the Conflict of Laws

(This list is a supplement to Mr. Goodrich's article on "Conflict of Laws since the Restatement," in the February issue, pp. 119-124.)

All citations to earlier drafts of the Restatement have been brought down to date.

§7 *Law of Forum Applied*
Gray v. Gray, 174 Atl. 508, 511 (N. H. 1934).

§9 *Domicil*
In re Reuff's Estate, 157 Misc. 680, 683, 684, 284 N. Y. Supp. 426, 430 (Surr. Ct. 1935); State *ex rel.* Carlson v. Hedberg, 192 Minn. 193, 196, 256 N. W. 91, 93 (1934).
Comment d
In re Barron, 26 F. (2d) 106, 108 (N. D. Mich. 1928).
Comment e
In re Barron, *supra.*

§10 *Domicil by What Law Determined*
(1) Dicks v. Dicks, 177 Ga. 379, 384, 170 S. E. 245, 247 (1933).

§11 *One and Only One Domicil*
Dicks v. Dicks, *supra.*
Topic 3. Acquisition and Change of Domicil
In re Packard's Estate, 223 App. Div. 491, 492, 228 N. Y. Supp. 591, 592 (4th Dep't, 1928), *order amended*, 225 App. Div. 731, 231 N. Y. Supp. 834 (4th Dep't, 1928), *aff'd in part and appeal dismissed in part*, 251 N. Y. 543, 168 N. E. 420 (1929).

§14 *Domicil of Origin*
In re Wendel, 144 Misc. 467, 469, 259 N. Y. Supp. 260, 262, 263 (Surr. Ct. 1932).

§15 *Domicil of Choice*
(2) (3). *In re* Dorrance's Estate, 309 Pa. 151, 180, 163 Atl. 303, 313 (1932) (dissenting opinion).

§16 *Requisite of Physical Presence*
Dicks v. Dicks, 177 Ga. 379, 384, 170 S. E. 245, 247 (1933).

§19 *Nature of Intention Required*
Dicks v. Dicks, *supra; In re* Dorrance's Estate, 115 N. J. Eq. 268, 277, 170 Atl. 601, 605 (1934); *In re* Dorrance's Estate, 309 Pa. 151, 174, 175, 163 Atl. 303, 311 (1932).

§20 *Present Intention*
In re Barron, 26 F. (2d) 106, 108 (N. D. Mich. 1928); Dicks v. Dicks, *supra.*

§23 *Continuing Quality of Domicil*
Dicks v. Dicks, *supra.*

§24 *Domicil of Person Having Two Homes*
In re Barron, *supra; In re* Dorrance's Estate, 309 Pa. 176, 163 Atl. 303, 311 (1932) (dissenting opinion).

§28 *Domicil of Wife Living Apart From Husband*
Wear v. Wear, 130 Kan. 205, 222, 285 Pac. 606, 614 (1930).

§29 *Domicil on Termination of Marriage*
Fitzgerald v. Fitzgerald, 210 Wis. 543, 547, 246 N. W. 680, 681 (1933).

§31 *Emancipated Child*
State *ex rel.* Larson v. Larson, 190 Minn. 489, 492, 252 N. W. 329, 330 (1934); Cohen v. Delaware L. & W. R. R. Co., 150 Misc. 450, 454, 269 N. Y. Supp. 667, 673 (Sup. Ct. 1934).

§34 *Illegitimate Child*
State *ex rel.* Larson v. Larson, *supra.*

§36 *Domicil on Death of Father*
State *ex rel.* Carlson v. Hedberg, 192 Minn. 193, 196, 256 N. W. 91, 93 (1934).

§37 *Power of Guardian over Domicil*
State *ex rel.* Carlson v. Hedberg, *supra.*

§38 *Power of Mother over Domicil*
State *ex rel.* Carlson v. Hedberg, *supra.*

§39 *"Natural" Guardian*
State *ex rel.* Carlson v. Hedberg, *supra.*
Comment a
State *ex rel.* Carlson v. Hedberg, *supra.*

§40 *Domicil of Person Mentally Deficient or of Unsound Mind*
Coppedge v. Clinton, 72 F. (2d) 531, 533, n.1 (C. C. A. 10th, 1934).

§47 *Jurisdiction over Persons in General*
In re McCormick's Estate, 260 Ill. App. 36, 61 (1931).

§50 *Chattels the Title to Which is Embodied in a Document*
(1) Hutchison v. Ross, 262 N. Y. 381, 390, 187 N. E. 65, 69 (1933) (court preceded citation by *"cf."*)

§51 *Jurisdiction over Intangible Things*
Ebsary Gypsum Co. v. Ruby, 256 N. Y. 406, 410, 176 N. E. 820, 821 (1931).

§53 *Shares in a Corporation*
Hutchison v. Ross, 262 N. Y. 381, 390, 187 N. E. 65, 69 (1933).

§54 *Status*
In re McCormick's Estate, 260 Ill. App. 36, 48 (1931).

§65 *Events Consequent on Acts Done in Another State*
Simons v. Inecto, 242 App. Div. 275, 279, 275 N. Y. Supp. 501, 505 (3d Dep't, 1934) (dissenting opinion).

§66 *Communications Sent From One State to Anot er*
Winslow Lumber Co. v. Hines Lumber Co., 125 Ore. 63, 67, 72, 266 Pac. 248, 249, 251 (1928).

§67 *Action Through Agent*
Winslow Lumber Co. v. Hines Lumber Co., *supra.*

§71 *Exercise of Judicial Jurisdiction*
In re Freeholders of Hudson County, 105 N. J. L. 57, 69, 70, 143 Atl. 536, 541 (1928) (dissenting opinion).
Comment c
In re Freeholders of Hudson County, *supra.*

§72 *Claim and Opportunity to be Heard*
Zulkhe v. Prudential Life Ins. Co., 244 App. Div. 549, 551, 279 N. Y. Supp. 833, 835 (4th Dep't, 1935).

§75 *Notice and Opportunity to be Heard*
Mazzoleni v. Transamerica Corp., 313 Pa. 317, 321, 169 Atl. 127, 129 (1933).

§77 *Bases of Jurisdiction*
In re McCormick's Estate, 260 Ill. App. 36, 61, 62 (1931); Northern Aluminum Co. v. Law, 157 Md. 641, 646, 147 Atl. 715, 717 (1929).
Comment a
Vaughn v. Love, 188 Atl. 299, 303 (Pa. 1936).

§79 *Individual Domiciled Within the State*
In re McCormick's Estate, 260 Ill. App. 36, 62 (1931); Northern Aluminum Co. v. Law, 157 Md. 641, 646, 147 Atl. 715, 717 (1929).

§82 *Appearance*
Tatum v. Maloney, 226 App. Div. 62, 69, 234 N. Y. Supp. 614, 622 (1st Dep't, 1929).

§84 *Jurisdiction over One Who Acts in State*
Davidson v. Henry L. Doherty & Son Co., 211 N. W. 700, 705, 214 Iowa 739, 752 (1932).

§89 *Absence of Consent for Doing Business*
Comment a
Illus. 4
Campbell v. United States Radiator Corp., 86 N. H. 310, 311, 167 Atl. 558, 559 (1933).

§90 *Consent*
Heyman v. Coal Co., 242 App. Div. 362, 364, 275 N. Y. Supp. 23, 25, 26, (1st Dep't, 1934); Mazzoleni v. Transamerica Corp., 313 Pa. 317, 321, 169 Atl. 127, 129 (1933).

§91 *Appointment of Agent or Official*
Mazzoleni v. Transamerica Corp., *supra.*
Comment c
Mazzoleni v. Transamerica Corp., *supra.*

§93 *Ceasing to Do Business*
Simons v. Inecto, 242 App. Div. 275, 279, 275 N. Y. Supp. 501, 505 (3rd Dep't, 1934) (dissenting opinion).

§95 *Order to Institute or Defend Proceedings in Another State*
Katakura and Co. v. Vogue Silk Hosiery Co., 15 D. & C. 389, 392 (Pa. 1931), *aff'd*, 307 Pa. 544, 161 Atl. 529 (1932).

§100 *Notice and Opportunity to Be Heard*
Zuhlke v. Prudential Life Ins. Co., 244 App. Div. 549, 551, 279 N. Y. Supp. 833, 835 (4th Dep't, 1935).

§103 *Jurisdiction Over Document*
First Trust Co. of St. Paul v. Matheson, 187 Minn. 468, 475, 246 N. W. 1, 4 (1932).
Comment b
First Trust Co. of St. Paul v. Matheson, *supra.*

§106 *Application of Things to Payment of Claims*
Zuhlke v. Prudential Life Ins. Co., 244 App. Div. 549, 553, 279 N. Y. Supp. 833, 838 (4th Dep't, 1935).

§108 *Application of Debts to Payment of Claims*
Heydemann v. Westinghouse Elec. Mfg. Co., 80 F. (2d) 837, 840, 841 (C. C. A. 2d, 1936) (court cited this section as *contra* to its holdings); Zuhlke v. Prudential Life Ins. Co., 244 App. Div. 549, 551, 279 N. Y. Supp. 833, 836 (4th Dep't, 1935).

§111 *State of Domicil of Neither Spouse*
Bergeron v. Bergeron, 287 Mass. 524, 529, 192 N. E. 86, 89 (1934).

§113 *State of Domicil of One Spouse*
Delanoy v. Delanoy, 216 Cal. 27, 39, 13 P. (2d) 719, 723 (1932).

§115 *Nullity*
McDonald v. McDonald, 58 P. (2d) 163, 165 (Cal. 1936); Davis v. Davis, 119 Conn. 194, 197, 175 Atl. 574, 575 (1934); Dodds v. Pittsburgh, M. and B. Ry. Co., 107 Pa. Super, 20, 29, 162 Atl. 486, 489 (1932).
(2) *Comment*
Dodds v. Pittsburgh, M. & B. Ry. Co., *supra.*

§116 *Alimony*
In re McCormick's Estate, 260 Ill. App. 36, 48 (1931).

§117 *Guardianship of the Person*
Wear v. Wear, 130 Kan. 205, 217, 285 Pac. 606, 612 (1930).

§120 *Effect of Foreign Status Unknown in Domestic Law*
Davis v. Davis, 119 Conn. 194, 198, 175 Atl. 574, 575 (1934); Holzer v. Deutsche Reichsbahn Gesellshaft, 159 Misc. 830 (N. Y. Sup. Ct. 1936), *aff'd sine opinion*, 288 N. Y. Supp. 736 (App. Div., 1st Dep't, 1936).

§121 *Law Governing Validity of Marriage*
Cosulich Societa Triestina di Navigazione v. Elting, 66 F. (2d) 534, 536 (C. C. A. 2d, 1933); McDonald v. McDonald, 58 P. (2d) 163, 165 (Cal. 1936); Davis v. Davis, 119 Conn. 194, 201, 175 Atl. 574, 577 (1934); Loughran v. Loughran, 292 U. S. 216, 223, n. 1 (1934) (court preceded citation by "*cf.*")
Comment b
Davis v. Davis, *supra.*

§122 *Requirements of State of Celebration*
Cosulich Societa Triestina Di Navigazione v. Elting, *supra;* Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§123 *"Common Law" Marriage*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§124 *Marriage by Proxy*
Cosulich Societa Triestina Di Navigazione v. Elting, 66 F. (2d) 534, 536 (C. C. A. 2d, 1933); Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§125 *Marriage by Correspondence*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§126 *Marriage Before a Consul*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§127 *Marriage on Board a Vessel*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§128 *Marriage in a Nomadic Tribe*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§129 *Evasion of Requirement of Domicil*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*"); Fitzgerald v. Fitzgerald, 210 Wis. 543, 550, 246 N. W. 680, 682 (1933).

§130 *Remarriage after One Party to Divorce Forbidden to Remarry*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*"); Fitzgerald v. Fitzgerald, *supra.*

§131 *Remarriage after Parties to Divorce Both Forbidden to Remarry*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§132 *Marriage Declared Void by Law of Domicil*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*"); Fitzgerald v. Fitzgerald, 210 Wis. 543, 550, 246 N. W. 680, 682 (1933).

§133 *Effect of Foreign Marriage*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§134 *Marriage Contrary to Public Policy*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§135 *Law Governing Right to Divorce*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*")

§136 *Law Governing Nullity*
Loughran v. Loughran, *supra* (court preceded citation by "*cf.*"); McDonald v. McDonald, 58 P. (2d) 163, 165 (Cal. 1936); Davis v. Davis, 119 Conn. 194, 198, 175 Atl. 574, 577 (1934).

§141 *Effect of Legitimacy Created by Foreign Law*
Dodds v. Pittsburgh, M. & B. Ry. Co., 107 Pa. Super. 20, 30, 162 Atl. 486, 489 (1932).

§144 *Law Governing Custody*
In re McCormick's Estate, 260, Ill. App. 36, 48 (1931).

§145 *Change of Custody Between Parents*
Yarborough v. Yarborough, 290 U. S. 202, 223, n. 19 (1933) (Dissenting opinion); *In re* McCormick's Estate, *supra.*

§146 *Custody on Legal Separation of Parents*
In re McCormick's Etate, *supra.*

§148 *Change of Custody by Foreign State*
Yarborough v. Yarborough, 290 U. S. 202, 223, n. 19 (1933) (Dissenting opinion); Butler v. Butler, 83 N. H. 413, 416, 143 Atl. 471, 473 (1928).

§155 *Questions of Incorporation*
First Title and Securities Co. v. Gypsum Co., 211 Iowa 1019, 1025, 1026, 233 N. W. 137, 140 (1930).

§158 *Recognition of Dissolution or Suspension of Powers*
Standard Lumber Co. v. Inter-State Trust Co., 82 F. (2d) 346, 349 (C. C. A. 5th 1936).

§162 *Winding-up Foreign Corporations*
Barrett v. Smith, 183 Minn. 431, 444, 237 N. W. 15, 21 (1931).

§168 *Refusal of State to Allow Business*
Mazzoleni v. Transamerica Corp., 313 Pa. 317, 322, 169 Atl. 127, 129 (1933).

§169 *Imposition of Terms*
Yarborough v. Yarborough, 290 U. S. 202, 218, n. 10 (1933) (Dissenting opinion); Mazzoleni v. Transamerica Corp., *supra.*

§170 *Constitutional Limitations upon Imposition of Terms*
Winslow Lumber Co. v. Hines Lumber Co., 125 Ore. 63, 67, 72, 266 Pac. 248, 249, 251 (1928).

§179 *Doing Business without Permission*
Townsend v. Rosenbaum, 60 P. (2d) 251, 261 (Wash. 1936).

§183 *Participation in Management and Profits*
Union and New Haven Trust Co. v. Watrous, 109 Conn. 268, 277, 146 Atl. 727, 730 (1929).

§185 *Shareholders' Liability to Assessments or Contribution*
Broderick v. Stephano, 314 Pa. 408, 410, 171 Atl. 582, 583 (1934).

§186 *Where Contribution can be Enforced*
Comment c
Bates v. Cooley, 60 P. (2d) 23, 25 (Wash. 1936).

§209 *Equitable Conversion of Real Property*
Bates v. Decree of Judge of Probate, 121 Me. 176, 183, 160 Atl. 22, 26 (1932).

§218 *Substantial Validity of Conveyance of Interest in Law*
Comment f
Irving Trust Co. v. Maryland Casualty Co., 83 F. (2d) 168 172 (C. C. A. 2d, 1936).
Comment g
Irving Trust Co. v. Maryland Casualty Co., *supra.*

§239 *Existence of Equitable Interests in Land*
Bates v. Decree of Judge of Probate, 131 Me. 176, 180, 160 Atl. 22, 24 (1932).

§244 *Equitable Conversion of Trust Property*
Bates v. Decree of Judge of Probate, *supra.*

§255 *Capacity to Convey Chattel*
Hutchison v. Ross, 262 N. Y. 381, 389, 187 N. E. 65, 68 (1933).

§256 *Formalities of Conveyance of Chattel*
In re L. VanBokkeien, 7 F. Supp. 639, 646 (D. Md. 1934).
Comment a—Caveat
Grinnell v. Comm'r of Int. Rev., 70 F. (2d) 705, 706 (C. C. A. 2d, 1934), *aff'd*, 294 U. S. 153 (1936) (When cited by court this was not a "*caveat*").

§257 *Substantial Validity of Conveyance of Chattel*
In re VanBokkelen, 7 F. Supp. 639, 646 (D. Md. 1934); Hutchison v. Ross, 262 N. Y. 381, 389, 187 N. E. 65, 69 (1933).

§260 *Moving Chattels into Another State; Effect on Title*
Jewett v. Keystone Driller Co., 282 Mass. 469, 485, 185 N. E. 369, 375 (1933) (dissenting opinion).

§261 *Chattel Embodied in a Document*
Hutchison v. Ross, 262 N. Y. 381, 390, 187 N. E. 65, 69 (1933).

§262 *Embodiment of Right in Document*
Hutchison v. Ross, *supra.*

§262 *Voluntary Assignment for Benefit of Creditors*
Judd v. Forsinger, 186 Atl. 525, 526 (N. J. Sup. Ct. 1936).

§266 *Effect of Taking Mortgaged Chattel into Another State*
Davis v. Standard Acc. Ins. Co., 35 Ariz. 392, 399, 278 Pac. 384, 386 (1929); Jewett v. Keystone Driller Co., 282 Mass. 469, 485, 185 N. E. 369, 375 (1933) (dissenting opinion).

§269 *Removal with Consent of Mortgagee; Effect of Dealings in Second State*

Universal Credit Co. v. Marks, 163 Atl. 810, 815 (Md. App. 1933); Jewett v. Keystone Driller Co., *supra* (dissenting opinion).

§272 *Conditional Sale of Chattel*
Jewett v. Keystone Driller Co., *supra* (dissenting opinion).

§273 *Conditional Sale; Effect of Taking a Chattel into another State*
Jewett v. Keystone Driller Co., *supra* (dissenting opinion).

§275 *Conditional Sale; Removal without Consent of Vendor*
Jewett v. Keystone Driller Co., *supra* (dissenting opinion).

§276 *Conditional Sale; Removal of Chattel with Consent of Vendor*
Jewett v. Keystone Driller Co., *supra* (dissenting opinion).

§279 *Lien and Pledge*
Universal Credit Co. v. Marks, 163 Atl. 810, 815 (Md. App. 1933).

§281 *Foreclosure and Redemption of Mortgage, Pledge or Lien*
Jewett v. Keystone Driller Co., 282 Mass. 469, 485, 185 N. E. 369, 375 (1933) (dissenting opinion).

§286 *Exercise of Power to Appoint Movables by Deed*
Grinnell v. Comm'r of Int. Rev., 70 F. (2d) 705, 706 (C. C. A. 2d, 1934), *aff'd*, 294 U. S. 153 (1936).

§297 *Administration of Trusts of Movables Created Inter Vivos*
Sanders v. Hall, 74 F. (2d) 399, 404, n. 4 (C. C. A. 10th, 1934).

§298 *Administration of Trusts of Movables Created by Will*
Comment c
In re Vanneck's Will, 158 Misc. 704, 706, 286 N. Y. Supp. 489, 492 (Surr. Ct. 1936).

§299 *Administration; by What Court Supervised*
Swetland v. Swetland, 105 N. J. Eq. 608, 617, 149 Atl. 50, 53, 54 (1930).
Comment a
In re Vanneck's Will, 158 Misc. 704, 706, 286 N. Y. Supp. 489, 492 (Surr. Ct. 1936).

§306 *Will of Movables*
In re Hauge's Estate, 92 Mont. 36, 43, 44, 9 P. (2d) 1065, 1068 (1932); Grinnell v. Commissioner of Int. Rev., 70 F. (2d) 705, 706 (C. C. A. 2d, 1934), *aff'd*, 294 U. S. 153 (1936).
Comment b
In re Hauge's Estate, 92 Mont. 36, 43, 44, 9 P. (2d) 1065, 1068 (1932).

§311 *Place of Contracting*
Brocalsa Chemical Co. v. Langsenkamp, 32 F. (2d) 725, 729 (C. C. A. 6th, 1929); Illinois Fuel Co. v. Mobile & O. Ry. Co., 319 Mo. 899, 913, 8 S. W. (2d) 834, 838 (1928).

§312 *Formal Contract*
State of Ohio *ex rel.* Fulton v. Purse, 273 Mich. 507, 509, 510, 263 N. W. 874, 875 (Mich. 1934).

§313 *Formal Renewal Contract*
Palmer Nat. Bank v. Van Doren, 260 Mich. 310, 313, 244 N. W. 485, 486 (1932).
Comment b
Palmer Nat. Bank v. Van Doren, *supra*.

§317 *Insurance Policy Delivered by Mail*
Sun Ins. Office v. Mallick, 160 Md. 71, 81, 82, 153 Atl. 35, 40 (1931).

§318 *Insurance Policy Delivered by Agency*
Sun Ins. Office v. Mallick, *supra*.

§319 *Insurance Policy Mailed to Broker*
Sun Ins. Office v. Mallick, *supra*.

§320 *Accommodation Paper*
Twentieth Street Bank v. Diehl, 85 S. W. (2d) 865 (Ky. App. 1935).

§332 *Law Governing Validity of Contract*
Mutual Benefit Health & Acc. Ass'n v. Baldridge, 70 F. (2d) 236, 239 (C. C. A. 10th, 1934); Louis Dreyfus v. Paterson S. S., 43 F. (2d) 824, 826 (C. C. A. 2d, 1930); Brocalsa Chem. Co. v. Langsenkamp, 32 F. (2d) 725, 729 (C. C. A. 6th, 1929); Illinois Fuel Co. v. Mobile & O. Ry. Co., 319 Mo. 899, 924, 8 S. W. (2d) 834, 843 (1928); State of Ohio *ex rel.* Fulton v. Purse, 273 Mich. 507, 509, 510, 263 N. W. 874, 875 (Mich. 1934); Dougherty v. National City Bank of N. Y., 157 Misc. 849, 857, 285 N. Y. Supp. 491, 501 (Sup. Ct. 1935).

§334 *Formalities for Contracting*
Lavas v. Smith Co., 178 Atl. 651, 653 (Del. Super. 1935).

§346 *Law Governing Extent of Contractural Obligations*
Indemnity Ins. Co. of N. Amer. v. Stamberger, 37 Ohio App. 236, 246, 174 N. E. 629, 633 (1930).

§343 *Defenses*
Commissioner of Int. Rev. v. Hyde, 82 F. (2d) 174, 176 (C. C. A. 2d, 1936).

§353 *Right of Assignee to Payment*
Comment a
Barbin v. Moore, 85 N. H. 362, 364, 159 Atl. 409, 411 (1932).

§354 *Successive Assignments*
Wishnick v. Preserves & Honey, Inc., 153 Misc. 596, 598, 275 N. Y. Supp. 420, 422 (Sup. Ct. 1934).

§355 *Place of Performance*
Swift v. Clay, 127 Kan. 148, 150, 272 Pac. 170, 171 (1928).

§358 *Law Governing Performance*
Swift v. Clay, *supra.*

§360 *Illegality of Performance*
Compania de Inversiones Internacionales v. Industrial Mtge. Bank of Finland, 269 N. Y. 22, 32, 198 N. E. 617, 621 (1935).

§366 *Person to Whom Performance Rendered*
Wishnick v. Preserves & Honey, Inc., 153 Misc. 596, 598, 275 N. Y. Supp. 420, 422, 423 (Sup. Ct. 1934).

§373 *Discharge of Contract by Subsequent Transaction*
Dougherty v. National City Bank of N. Y., 157 Misc. 849, 857, 285 N. Y. Supp. 491, 501 (Sup. Ct. 1935).

Scope Note of Topic 1 of Chapter 9—Torts
Benton v. Safe Deposit Bank, 255 N. Y. 260, 265, 174 N. E. 648, 649 (1931).

§377 *The Place of Wrong*
Conklin v. Canadian-Colonial Airways, Inc., 266 N. Y. 244, 248, 194 N. E. 692, 694 (1935); Benton v. Safe Deposit Bank, *supra.*

Note: Summary of Rules in Important Situations Determining Where a Tort is Committed
Rule 5
Benton v. Safe Deposit Bank, *supra.*

§378 *Law Governing Plaintiff's Injury*
Scheer v. Rockne Motors Corp., 68 F. (2d) 942, 943 (C. C. A. 2d, 1934); The Mandu, 15 F. Supp. 627, 629 (E. D. N. Y. 1936); General Acc. Fire and Life Assur. Corp. v. Zerbe Const. Co., 269 N. Y. 227, 231, 199 N. E. 89, 90 (1935) (court preceded citation by "*cf.*").

§379 *Law Governing Liability-Creating Conduct*
Reed & Barton Corp. v. Maas, 73 F. (2d) 359, 361 (C. C. A. 1st, 1934); Mike v. Lian, 185 Atl. 775, 777 (Pa. 1936).

Comment a
Benton v. Safe Deposit Bank, 255 N. Y. 260, 265, 174 N. E. 648, 649 (1931)

§380 *Application of Standard of Care*
Comment b
Singer v. Messina, 312 Pa. 129, 136, 167 Atl. 583, 585 (1933).

§381 *Specific Conditions of Liability*
Benton v. Safe Deposit Bank, 255 N. Y. 260, 265, 174 N. E. 648, 649 (1931).

§382 *Duty or Privilege to Act*
Gray v. Gray, 174 Atl. 508, 509 (N. H. 1934); Benton v. Safe Deposit Bank, *supra.*

§383 *Causation*
Gray v. Gray, *supra.*

§384 *Recognition of Foreign Cause of Action*
Irving Trust Co. v. Maryland Casualty Co., 83 F. (2d) 168, 171 (C. C. A. 2d, 1936); Gray v. Gray, *supra;* Benton v. Safe Deposit Bank, *supra.*
(2)
Mike v. Lian, 185 Atl. 775, 777 (Pa. 1936).

§385 *Contributory Negligence*
Jerrell v. New York Cent. R. R., 68 F. (2d) 856, 857 (C. C. A. 2d, 1934), *cert. denied,* New York Cent. R. R. v. Jerrell, 292 U. S. 646 (1934); Gray v. Gray, 174 Atl. 508, 509 (N. Y. 1934); Holzer v. Deutsche Reichsbahn Gesellshaft, 159 Misc. 830 (N. Y. Sup. Ct. 1936), *aff'd, sine opinion,* 288 N. Y. Supp. 736 (App. Div., 1st Dep't, 1936); Olson v. Omaha & C. B. St. Ry., 267 N. Y. 246, 248 (Neb. 1936).

§386 *Liability to Servant for Tort of Fellow Servant*
Gray v. Gray, *supra.*

§387 *Vicarious Liability*
Gray v. Gray, *supra.*

§388 *Defenses*
Gray v. Gray, *supra.*

§389 *Discharge or Modification of Cause of Action*
Gray v. Gray, *supra.*

§390 *Survival of Actions*
Dougherty v. Gutenstein, 10 F. Supp. 782, 784 (S. D. N. Y. 1935); Gray v. Gray, *supra;* Herzog v. Stern, 264 N. Y. 379; 382, 191 N. E. 23 (1934), *cert. denied,* 293 U. S. 597 (1935); Domres v. Storms, 236 App. Div. 630, 635, 260 N. Y. Supp. 335, 342 (4th Dep't, 1932).

Comment b
Dougherty v. Gutenstein, *supra;* Herzog v. Stern, *supra.*

§391 *Right of Action for Death*
Ghilain v. Courture, 84 N. Y. 48, 50, 146 Atl. 395, 396 (1929); Dickinson v. Jones, 309 Pa. 256, 260, 163 Atl. 516, 517 (1932).

§394 *Person to Bring Suit*
Dickinson v. Jones, *supra.*

§395 *Right of Action to Widow or Named Relative*
Ghilain v. Couture, *supra.*

§396 *Right of Action to Executor or Administrator*
Ghilain v. Couture, *supra;* Wikoff v. Hirschel, 258 N. Y. 28, 32, 179 N. E. 239, 250 (1932); Dickinson v. Jones, *supra.*

§397 *Limitation of Action for Death*
Rosenzweig v. Heller, 302 Pa. 279, 283, 153 Atl. 346, 347 (1931).

§398 *Compensation under Act of State of Employment*
Alaska Packers Ass'n v. Industrial Acc. Comm., 1 Cal. (2d) 250, 259, 34 P. (2d) 716, 721 (1934).

Comment a
Alaska Packers Ass'n v. Industrial Acc. Comm., *supra.*

§399 *Compensation under Act of State of Harm*
Alaska Packers Ass'n v. Industrial Acc. Comm., 1 Cal. (2d) 250, 260, 261, 34 P. (2d) 716, 721, 722 (1934).

§400 *Neither Employment Nor Injury in State*
Selser v. Bragmans Bluff Lumber Co., 146 So. 690, 696 (La. App. 1933); Liggett & Meyers Tobacco Co. v. Goslin, 163 Md. 74, 83, 160 Atl. 804, 809 (1932).

§402 *Effect of Two Acts Governing Injury*
Salvation Army v. Industrial Comm., 219 Wis. 343, 348, 263 N. W. 349, 352 (1935).

§403 *Effect of Previous Award*
Salvation Army v. Industrial Comm., *supra.*

§418 *Interest as Damages for Breach of Contract*
Parker v. Hoppe, 257 N. Y. 333, 343, 178 N. E. 550, 552 (1931).

§419 *Interest on Injury to Property*
Parker v. Hoppe, *supra.*

§420 *Interest on Foreign Judgment*
Parker v. Hoppe, *supra.*

§438 *Vacated Judgment*
Comment a
McDonald v. McDonald, 228 App. Div. 341, 347, 239 239 N. Y. Supp. 533, 539 (1930).

§449 *Judgment Ordering or Enjoining Act*
Curtis v. Campbell, 76 F. (2d) 84, 85 (C. C. A. 3d, 1935).

§450 *Effect of Valid Foreign Judgment*
Comment i
McDonald v. McDonald, 228 App. Div. 341, 349, 239 N. Y. Supp. 533, 541 (1930).

§452 *Right Resulting From Conferring Benefit*
Universal Credit Co. v. Marks, 163 Atl. 810, 815 (Md. App. 1933).

§455 *Bastardy Proceeding at Domicil of Father*
Curtis v. Campbell, 76 F. (2d) 84, 85 (C. C. A. 3d, 1935).

§457 *Legislative Jurisdiction to Impose Obligation to Support*
Yarborough v. Yarborough, 290 U. S. 202, 224 (1933) (dissenting opinion).

§464 *Enforcement of Foreign Decree for Alimony*
Bentley v. Calabrese, 155 Misc. 843, 845, 290 N. Y. Supp. 454, 456 (Sup. Ct. 1935).

§514 *Effect of Judgment Against Foreign Administrator under Statute*
Comment a
York v. Bank of Commerce & Trust Co., 19 Tenn. App. 594, 603, 604, 93 S. W. (2d) 333, 339 (1935).

Comment b
York v. Bank of Commerce & Trust Co., *supra.*

§558 *How Claims Against an Insolvent Estate are Paid*
Hospelhorn v. General Mot. Corp., 182 Atl. 442, 446 (Md. 1936).

§559 *How Claims Against an Insolvent Estate are Paid; Proportionate Payment*
Hospelhorn v. General Mot. Corp., *supra.*

§584 *Determination of Whether Question is One of Procedure*
Crampton v. Frione Co., 1 F. Supp. 989, 990 (D. Conn. 1932).
§585 *What Law Governs Procedure*
Crampton v. Frione Co., *supra.*
§588 *Parties*
General Acc. Fire & Life Assur. Corp., v. Zerbe Const. Co., 269 N. Y. 227, 231, 199 N. E. 89, 90 (1935) (court preceded citation by "*cf.*")
§594 *Mode of Trial*
Singer v. Messina, 312 Pa. 129, 135, 136, 167 Atl. 583, 585 (1933).
§595 *Proof of Facts*
Olson v. Omaha & C. B. St. Ry., 267 N. W. 246, 248 (Neb. 1936).
§609 *Action Would Result in More Onerous Duty*
Mertz v. Mertz, 3 N. E. (2d) 597, 599 (N. Y. 1936).
§612 *Action Contrary to Public Policy*
Mertz v. Mertz, 3 N. E. (2d) 597, 598 (majority opinion), 600 (dissenting opinion) (N. Y. 1936).
Comment c
Mertz v. Mertz, 3 N. E. (2d) 597, 601 (N. Y. 1936) (dissenting opinion); Domres v. Storms, 236 App. Div. 630, 632, 260 N. Y. Supp. 335, 338 (4th Dep't, 1932); *In re* Killough's Estate, 148 Misc. 73, 90, 265 N. Y. Supp. 301, 322 (Surr. Ct. 1933).
Illus. 1 *and* 2
Windt v. Lindy, 84 S. W. (2d) 99, 100 (Tenn. 1935), *cert. denied,* 296 U. S. 637 (1936).
§621 *Proof of Foreign Law*
General Motors Acc. Corp. v. Foley, 311 Pa. 477, 481, 166 Atl. 909, 910 (1933).
§622 *Foreign Common Law*
General Motors Acc. Corp. v. Foley, *supra.*

Current Events

(*Continued from page* 165)

power to define and regulate the practice of law being inherent in the court, no statute is necessary to authorize the exercise of such power." He then continued to discuss the extent of the court's power to regulate the practice of law and maintained that it was exclusive of the power of the legislature on the subject, following the Illinois case of People v. People's Stock Yards State Bank.

Chief Justice Ellison, with whom four other judges concurred, agreed with the result but disagreed with this view of the relationship of the legislature and the court. His view, which he sustained with abundant authority, was that while the court had inherent power to define and regulate the practice of law, the legislative department could enact laws on that same subject if and insofar as such statutes did not destroy the inherent power of the courts and that the enactment of such statutes was a valid exercise of the police power. He also referred to some decisions holding that the courts recognize legislative acts regulating the practice of law only out of comity or general acquiescence and to the view held in a few cases that the power of the courts to determine the qualifications of persons licensed to practice law is exclusive. He concluded that since there was a valid Missouri statute prohibiting laymen from practicing law and defining the practice of law, among other things as including the appearance in a representative capacity before any board or commission constituted by law, respondents had violated the law and should be punished for contempt. His opinion is the most recent and one of the fullest discussions of the whole question of the inherent power of the court to regulate the practice of law. It also contains in the form of an addendum, a valuable summary of the constitutional and code provisions of the United States and the several states relative to the making of statutes or rules of practice and procedure.

Judge Gantt filed a separate concurring opinion in which he argued that the Supreme Court had the exclusive power to define and regulate the practice of law and that the legislature could not encroach on this power. But in his opinion the legislature could enact statutes condemning unauthorized practice under its police power and such statutes did not encroach on the court's power and were therefore, as in this case, constitutional.

Rhode Island Also Discusses Inherent Power

It is interesting to note that a very recent decision of the Rhode Island Supreme Court in the case of Creditors Service Corporation v. M. Joseph Cummings et al. (C. Q. No. 593) also discusses inherent power and agrees with the views expressed by Chief Justice Ellison, set forth above. This was a case in which the Plaintiffs sought to enjoin the chief of the division of banking and insurance and the department of taxation and regulation of Rhode Island, and the Attorney General from enforcing the provisions of a chapter of the statutes forbidding laymen to practice law and enumerating certain things which were included in that phrase, on the ground that it was an unconstitutional invasion of the power of the judiciary. The court held that the legislation was a valid exercise of the police power of the state and reaffirmed its decision in the leading case of Rhode Island Bar Association v. Automobile Service Association, which case it interpreted to declare:

"The practice of the law is affected with a public interest. It is, therefore, the right and duty of the state to regulate and control it so that the public welfare will be served and promoted.

Assuring protection to duly licensed attorneys and counsellors against invasions of their franchise by unauthorized persons is only incidental or secondary to its primary purpose. Great and irreparable injury can come to the people, and the proper administration of justice can be prevented, by the unwarranted intrusion of unauthorized and unskilled persons into the practice of law."

Missouri and Virginia Decide Against Collection Agencies

In two important collection agency decisions recently rendered, the Supreme Courts of Missouri and Illinois held that the respective organizations involved were engaged in the practice of law.

In the Missouri case of State ex inf. Roy McKittrick, Attorney General v. C. S. Dudley & Company (No. 34,682), the court found the company had split fees with attorneys engaged by it to collect accounts for its customers contrary to the provisions of Missouri statutes and had practiced law. An injunction was granted and the company was fined one dollar, but an ouster writ was refused.

The action of the lower court in the case of Bar Association of the City of Richmond v. Richmond Association of Credit Men was upheld by the Virginia Supreme Court on January 14 in a decision in which it was declared that "by assuming and maintaining control over the services of the lawyer, the

credit association has absorbed and destroyed the relation of direct personal confidence and responsibility which ought to exist between attorney and client" and has been practising law.

Goodman Case Decided Against Claim Adjuster

On rehearing of the Goodman case in Illinois (People ex rel The Chicago Bar Association v. Goodman, No. 23052), the respondent was found guilty of contempt of court and was fined $50,000, three judges dissenting.

In that case a lay claim adjuster, having a large business in adjusting claims for injured workmen, including making settlements, preparng and filing papers with the Industrial Commission, appearing and prosecuting cases before it and on occasion hiring attorneys, was held to be unlawfully practicing law.

These cases will be more fully reported in the March issue of UNAUTHORIZED PRACTICE NEWS published in the Association's Committee on that subject.

Bar Associations Act on Court Proposals

STATE and local Bar Associations, either by referenda or through their Executive Committees, are expressing their views on the President's judicial reorganization plan. Very little attention is apparently being paid at this time to any of the proposals excepting those affecting the Supreme Court. Here are the results of the vote of some of the Associations:

Illinois State Bar Association, 2,062 against the proposals affecting the Supreme Court and 367 in favor; Chicago Bar Association, 2,083 against, 533 for; Bar Association of the City of New York, 517 against, 88 for; San Francisco Bar Association, 703 against, 129 for; Denver Bar Association, 172 against, 55 for; Indiana (all lawyers in State), 2149 against, 540 for.

St. Louis Bar Association, 232 against, 14 for; Rhode Island Bar Association, 264 against, 18 for; Virginia State Bar Association, 230 against, 51 for; Milwaukee County Bar, 282 against, 39 for; Washington State Bar Association, 5 to 1 against; New Jersey State Bar Association, vote at regular mid-winter meeting "almost unanimously against"; Cincinnati Bar Association, "overwhelming majority against"; Connecticut State Bar Association (incomplete), 366 against, 9 for.

Executive Committee of Mississippi State Bar, 10 against, 3 for; Cleveland Bar Association, Executive Committee opposed plan; Buffalo Bar Association, 602 against, 89 for; Los Angeles Bar Association's Board of Trustees opposed plan; New York State Bar Association's Executive Committee opposed plan (32 to 2) and voted to conduct referendum.

This list is of course very incomplete. It merely represents the scattered returns received up to March 2.

New York Judicial Council Reports Substantial Results from Attack on Law's Delay and Other Evils—Statistics Showing Present Situation in Courts—Various Recommendations

SUBSTANTIAL and encouraging results from its efforts to deal with the problems of undue delay, complexity, uncertainty and expense in the administration of Justice are shown in the Third Annual Report of the Judicial Council of the State of New York, submitted to the Legislature in January.

When the Judicial Council was organized in 1934, a summary of the report given to the press states, it undertook as its most important task, the elimination of delay in bringing actions to trial in the civil courts, which has always been the chief defect in the proper administration of justice in New York. The Council's Report states, "From this delay stem most of the other evils of our present judicial system, such as expense, uncertainty and complexity. During the two and a half years of its existence, the Council has attacked these evils. More than seventy of the Council's recommendations tending to their elimination have been put into effect by the Legislature and rule-making bodies. Over and above any improvements due to specific recommendations, the Council believes that its existence has stimulated among the members of the Bench and Bar a quickened morale and a renewed faith in the 'efficacy of effort.' It is, therefore, encouraging to consider the extent to which the problems of undue delay, complexity, uncertainty and expense are coming under control and approaching solution. To provide such a solution, the Council will continue to make further recommendations for reorganization of the courts, improvements of procedure and methods of administration, and increased effort by the judiciary, and to overcome, as far as is humanly possible, the obstacles that now stand in the way of a more perfect administration of justice."

Statistical Evidence of Improvement

How successful the unremitting attacks of the Council on these problems have been, the summary continues, appears from the Report which makes available, for the first time, full statistical information on the work of all the courts in the State. Thus the Report states that delay and congestion in the court calendars are at present less than they have been for generations. By continuing efforts the Council is confident that in the near future every action will be assured of a speedy and efficient trial.

The statistical standard of delay used by the Council is six months in the ordinary jury case for negligence. Other types of cases are generally disposed of within a few months.

The calendars of the inferior courts of New York City, which were particularly congested, have improved markedly during the past two years. In the New York City Court, according to the Report, cases pending decreased from 30,430 in 1934 to 19,000 in 1935, and to 15,092 in 1936, a decrease of 50% in the two year period. Delay has declined equally sharply. In addition to eliminating delay in commercial cases, delay in tort cases has been further decreased during 1935-1936 from 31 to 20 months in jury and non-jury cases in New York County, from 40 to 21 months in jury cases in Bronx County, and in Kings County from 42 to 37 months in jury cases and from 26 to 6 months in non-jury cases.

In the New York City Municipal Court, from June, 1934, to June, 1936, the number of cases on the trial calendar has been cut down by half, from 73,836 to 43,181. Delay has been eliminated throughout the court except on the tort calendars of the Manhattan and Brookyn Central Jury Parts. It may now be possible, therefore, to eliminate the remaining delay and arrears of cases by June, 1937. The Small Claims Part of the Court dealing with cases under $50 disposed of 20,606 cases without delay of more than a few days.

In the Supreme Court the calendars have remained at about the same level. The delay, however, partly through proper assignment of Justices, has somewhat decreased. There is at present delay in the Supreme Court of over six months in only ten counties. In June, 1935, such delay had existed in 17 counties and in June, 1934, in 24 counties. The delay in six of these ten counties is borderline delay, which may be overcome during the coming year. This is especially true of Westchester County where delay during the past two years dropped from 38 to 7 months and the cases on the calendars were reduced by 50%. This is largely attributable to the transfers of Justices of the Supreme Court from the Third and Fourth Departments.

The report lists the more important of the thirty-six Judicial Council recommendations which were adopted in 1936, and gives a number of its latest recommendations. Hon. Frederick E. Crane, Chief Judge of the Court of Appeals, is Chairman of the Council.

News of the Bar Associations

Oklahoma State Bar Holds Meeting—President Richardson Advocates Creation of Intermediate Appellate Courts—Study of Better Plan for Judicial Selection Urged—Resolution Regarding Appointment of Federal Judge

THE fact that the Bar of Oklahoma is keeping step with the American Bar Association, and other State Bar Associations, was evidenced by the interest in proceedings at the Seventh annual meeting of the State Bar of Oklahoma, held in Oklahoma City, December 29th and 30th, 1936.

President E. L. Richardson, in his annual address before the general assembly, in advocating a reform in the Judiciary of the State, suggested the creation of intermediate appellate courts, and urged that a committee be appointed, or that the Judicial Council be given the power, to investigate fully the set up of intermediate appellate courts now functioning in a number of states of the Union. He suggested the creation of intermediate appellate courts which should have final jurisdiction over all matters, aside from public and constitutional questions, up to a certain amount, and that it should be the duty of these courts to hold a term of court at stated times throughout the year, in each county in order that appeals from the respective counties might be heard in the county from which the appeal came.

Here the court would have the opportunity of examining the original exhibits and the litigant himself could be present if he desired and hear the arguments of counsel and the questions of the Court. By this method appeals could be perfected and heard in from four to six months after they were tried, which would result in the elimination of a great number of appeals that are now being taken purely for the purpose of delay, and reduce the great amount of small cases that now come before the Supreme Court.

President Richardson also urged the reduction of the number of jurors trying civil cases from twelve to six.

Unauthorized Practice of the Law

Ben B. Blakeney, Jr., Chairman of the Committee on Unauthorized Practice of the Law, in his annual report to the State Bar, stated that it was the opinion of the committee that the public was not properly advised as to the dangers of unauthorized practice, and that the problem of the unauthorized practice of the law was to a great extent a matter of education. He pointed out that we might put a layman in jail for practicing without a license and that it would have the effect of making a martyr of that particular person, but that it would show the public that lawyers could better serve them, that the lawyer was under control at all times, had a code of ethics to which he must conform, and that the public had recourse, through the bar, against any lawyer who failed to live up to his oath of office. We would then make greater progress in curbing the unauthorized practice of the law than we have in the past.

State Bar Examiners

Mr. Ray McNaughton of Miami, Chairman of the Committee of State Bar Examiners, in his annual report urged the increase of academic and legal training of candidates for the Bar. He pointed out the weakness of the Oklahoma system as it now stands, comparing our high percentage of failures in bar examinations with the low percentage of failures in Kansas, giving as a reason the Kansas requirements which are the highest of any state in the Union. In other words, they dispose of the unfit long before they get to the examining Board.

Chairman McNaughton praised the work of the National Conference of Bar Examiners in their character reports

FELIX C. DUVALL
President State Bar of Oklahoma

of lawyers and students coming to Oklahoma from other states.

Restatement of the Law

Dr. Floyd A. Wright of the Oklahoma University Law School, Chairman of the Restatement of the Law Committee, explained to the meeting the work that was being carried on by this committee. He stated that it has already finished the restatement of Agency, Conflict of Laws, Contracts and Torts; that the Board of Governors is paying for an assistant to carry on this work; and that the committee has been successful in securing an appropriation through the National Youth Administration whereby students, who showed an aptness in this kind of work, could be used in checking annotations.

Dr. Wright complimented the work of Mr. Henry M. Gray, a member of the Tulsa Bar, on the subject of trusts, as well as his work on the Conflict of Laws.

Judicial Selection

One of the outstanding addresses of the meeting was the address of Mr. A. W. Trice of Hugo, Oklahoma, entitled "A Country lawyer's idea of Judicial Selection." Mr. Trice went into the history of the selection and election of judges, stating that most of the technicalities now surrounding the practice of the law and the proceedings of courts were the result of decisions by elected judges. In his opinion a Judge should be in the same position as an umpire in a baseball game: first, he must know the rules and, second, make the decision unbiased by the uniform of the player or by criticism from the bleachers.

He urged that a committee be appointed to study various plans now in vogue in many States and to work out one whereby the Judiciary would be appointed under proper safeguards—that is, the plan set up should not permit the Chief Executive or a member of the legislative body to pay a political debt in this way.

After Mr. Trice's address, the following resolution addressed to the President, the Attorney General of the United States and Senators Elmer Thomas and Josh Lee was adopted:

"Whereas, the Congress of the United States has authorized the appointment of an additional Federal Judge in Oklahoma, and

"Whereas, the press of the State has repeatedly charged that the appointment to be made is, or will be, controlled by politics, disregarding qualifications or ability.

"Therefore, Be it Resolved by the Oklahoma Bar Association in convention assembled this 30th day of December, 1936, that we deplore the unfavorable publicity given to the honored and exalted position of Federal Judge, and we urge that the selection of Judge be made from the many qualified and competent members of the Bar of Oklahoma without regard to political preferment. That such appointee shall possess sound legal education, with capacity and inclination to render fair judgment, and possess basic and inherent qualifications of independence and integrity.

The appointment of Federal Judges, who hold office for life, should not be made to pay political debts, but the welfare of the citizenship of Oklahoma should receive first consideration, and to such appointee, possessing the qualifications herein set out, we pledge our help and cooperations."

Criminal Law

The Section on Criminal Law, recommended the following matters to the Board of Governors for submission to the legislature for consideration:

(1) When the issue of insanity of the defendant is raised in a criminal case, should a statute be enacted, providing that the Court must appoint disinterested medical witnesses to examine the accused and to testify at the trial?

(2) Should the statute provide for an alternate juror in criminal cases?

(3) Should county attorneys be required to submit a summary of the record and citations of authority, to assist the Attorney General in appeals of cases in their county?

The following recommendations of

the section were withheld for further consideration:

(1) Should the defendant, deciding to put in issue the defence of an alibi, be required to give more than five days notice as provided in the recent statute of the State of Oklahoma, and if so, how many days notice should the government be given of this defense?

(2) Should a statute be enacted authorizing the County Attorney in the trial of a criminal case, to comment on the fact that the defendant did not take the stand?

(3) Should a statute be enacted authorizing the trial Court to fix the punishment in capital cases?

(4) Should the general statutes prescribing punishment for different types of crime, be amended to provide only for a maximum sentence?

(5) Should the statute be amended for a majority of jurors to return a verdict of conviction or acquital in criminal cases, in the manner as the statute provides for a verdict in civil cases?

Taxation

The section on taxation reported a very enthusiastic meeting. It dealt with the work which the committee had done in assisting the Oklahoma Tax Commission during the past year in publishing the Oklahoma Tax Code. A committee was appointed by this section to cooperate with and assist the Oklahoma Tax Commission in its endeavors to bring about a revision of the lax laws of the State of Oklahoma.

Real Estate

The section on Real Estate Law urged that Section 1193, Oklahoma Statutes 1931, be amended so that the homestead will be treated as a part of the assets of the decedent, for the purpose of determination of heirship, and that where there are no assets belonging to an estate, except the homestead, there be a short and simple method provided whereby the County Court could take jurisdiction, and upon reasonable notice, make a finding designating the heirs and the rights of the homestead, and that the statutes requiring the giving of notice in probate procedure be amended so that all notices be the same length of time.

Corporation Law

The report of the Corporation law section recommended the re-draft of the entire corporation statutes of the State of Oklahoma, and that the State Bar of Oklahoma, acting through the Board of Governors, employ or cause to be employed a competent person or committee, to prepare and submit to the State Bar a draft of a proposed modern and adequate chapter on corporation law, and that the same be submitted to the legislature for enactment.

A very interesting paper on "Co-operative Corporations" was delivered by Miss Mary Francis of Oklahoma City, president of the Women Lawyers of Oklahoma.

The annual banquet of the State Bar was held in the main dining room of the Hotel Biltmore, Tuesday evening, December 29th. The speaker of the evening, the Hon. Nelson Phillips of Dallas, Texas, spoke on "The lawyer and his land-marks."

Board Selects Officers

At the conclusion of the annual meeting, the newly elected Board of Governors of the State Bar reported the election of the following officers for the enusing year:

President, Felix C. Duvall, Ponca City; First Vice-President, Logan Stephenson, Tulsa; Second Vice-President, Fred Suits, Oklahoma City; Third Vice-President, C. B. Holtzendorff, Claremore; Treasurer, Walter Arnote, McAlester; Executive Secretary, Reuel Haskell, Jr., Oklahoma City.

F. B. H. Spellman, of Alva, and A. W. Trice, Hugo, were reelected Editor-in-chief and Associate Editor, respectivly, of the Oklahoma State Bar Journal.

F. B. H. SPELLMAN,
Editor-in-Chief Oklahoma State Bar Journal.

Utah State Bar Requests Bar Commission to Raise Dues to Provide Funds to Combat Unlawful Practice—Non-Partisan Ballot for Judges Recommended—Proposed Federal Court Rules Discussed

ONE decided impression continues with the passing into history of the Sixth Annual Meeting of the Utah State Bar at Salt Lake City on December 18th and 19th: Utah lawyers are banded together into an organization equipped to accomplish public and professional good, and that organization has the support of the public and of the members of the Bar.

ROYAL J. DOUGLAS
President, Utah State Bar

Plan to Provide Funds for Investigation of Unauthorized Practice

An outstanding incident illustrating the temper of the meeting occurred in the afternoon of the first day when no second could be found to the motion of the chairman of the Unlawful Practice Committee to adopt a report recommending disbanding the committee, in part because of lack of funds. Following protests from lawyers from all parts of the State, the objectionable part of the report was withdrawn and a resolution adopted with but one dissenting vote, requesting the Bar Commission to raise the annual dues from $5.00 to $7.50 in order to raise an estimated $1,800 to supplement funds for the investigation and prosecution of unethical and unauthorized persons, both within and without the Bar.

President Frank A. Johnson opened the second day with a comprehensive report of the activities of the Board of Commissioners for the past year,

following which meetings were held by the various sections. Created on an autonomous basis last year, the section meetings are obviously affording a bar activity new in Utah which is attractive to many lawyers outstanding in their professional work and who are interested primarily in legal problems. Among papers presented and discussed were those on "Amendments to the Probate Code," by H. P. Thomas, and "Uniform Real Estate Contracts," by O. A. Weisley, both of the Property Law Section; "A Financial Responsibility Act," by Ralph T. Stewart of the Insurance Section; and "Extraditing Witnesses in Criminal Prosecutions," by Paul B. Thatcher of the Criminal Law Section. Chairmen Franklin Riter of the Property Law Section, Stuart P. Dobbs of the Public Law Section, A. E. Bowen of the Insurance Law Section, and M. B. Pope of the Criminal Law Section, presided over their respective meetings.

Meetings of various law school alumni associations, of Phi Alpha Delta and Delta Theta Phi alumni chapters, and of the Junior Bar and Judicial Sections were held during the first day which closed with a stag "Gridiron Banquet" conducted under the auspices of the Salt Lake County Bar Association, President Burton W. Musser presiding. A. Pratt Kesler, Utah Chairman of the Junior Bar Conference of the American Bar Association, was elected chairman of the Junior Bar Section, succeeding Elliott E. Evans, while the judges elected District Judge George Christensen, of Price, Chairman and District Judge Herbert M. Schiller, of Salt Lake, Secretary.

Report of Judicial Council

A. B. Irvine, reporting for the Judicial Council, announced that every court calendar in the State was substantially clear of work, and that the Supreme Court Calendar, only a few years ago seriously cluttered, was "never in better shape." Recommendations of the Criminal Procedure Committee presented by Chairman Carl A. Badger were adopted and the legislative committee directed to introduce and sponsor before the 1937 legislature bills designed to centralize criminal prosecutions under the district attorneys, to extend the short form of indictment to preliminary hearings before justices of the peace, and to create a new crime, that of false swearing.

A steadily increasing percentage of successful candidates taking the bar examination was indicated by Chairman Sam D. Thurman, of the Committee of Bar Examiners, who pointed out that the adoption of the American Bar Association minimum admission requirements was resulting in elimination of the unfit before applying for permission to take the examination. Adoption during the last year of publication of the names of all applicants and of personal investigations of every applicant was reported. Reports were also made by the following committees: Memorials, Roy D. Thatcher; American Law Institute by George Harris Smith; Law Lists and Directories, Burton W. Musser; American Citizenship, Carl A. Badger; Circuit Court of Appeals, R. L. Judd; Printing Session Laws, Clair M. Senior; and Relations with Trust Companies by John D. Rice.

Demand for Better Method of Selecting Judges

Following a detailed presentation and discussion of the proposed Federal Court Rules by W. Q. Van Cott and Paul Ray, Dean F. Brayton, Chairman of the Committee on Judicial Selection, told of the year's continued efforts by his committee directed toward a better selection of judges than by Utah's unsatisfactory method of partisan elections. Again the temper of the meeting was shown by vigorous discussion of the re-

port and almost unanimous demands that something be accomplished in this direction. The Board of Commissioners and the Committee were directed to sponsor a legislative change to the non-partisan, headless ballot method in use by several states, including Idaho, since change by constitutional amendment seemed at present impossible. Canon 28 of the American Bar Association Code of Judicial Ethics was adopted in full with obvious and irreconcilable conflicts between the Canon and the present practices of candidates for judicial office inevitable if the proposed changes in the present statutory method of election are not adopted.

Proposed Legislative Changes Recommended

More than fifteen proposed legislative changes in substantive fields of the law were recommended by the various sections and upon adoption of the recommendations by the reassembled membership, the legislative committee was directed to introduce and sponsor the bills. More important are those designed to centralize the responsibility for criminal prosecutions in the state, now divided among three agencies, to require financial responsibility by those licensed to drive motor vehicles, and to place a statute of limitations on actions to set aside tax titles.

Closing the Annual Meeting with an address comparing American and English practice, and commenting on the effect of the Proposed Federal Rules in this respect, Judge George T. McDermott of the Tenth Circuit Court of Appeals called upon each member of the bar to join in the work of the profes-

sion. Judge McDermott's address, given at the Banquet held Saturday evening was followed by the announcement of the election of Former District Judge A. V. Watkins, of Provo; Henry E. Beal, of Richfield, and Reuben J. Shay, of Cedar City, to the Board of Commissioners, and the selection of Royal J. Douglas, of Ogden, as President succeeding President Johnson, who will continue on the Commission for another year. W. Q. Van Cott, of Salt Lake, was elected Vice-President, and L. M. Cummings, Secretary, for the sixth successive year.

While the attendance at the various meetings ranged from fifty to approximately four hundred, a check at the registration desk revealed that more than ninety percent of the Utah members of the State Bar, together with visiting attorneys from Idaho, Wyoming, Nevada and California, were in attendance at some or all of the sessions.

L. M. CUMMINGS,
Secretary.

West Virginia Bar Association Hears President Hugus Discuss "State Bar Integration"—Address on Proposed Changes in Federal Practice — Other Speakers on Program—Officers Elected

THE West Virginia Bar Association held its Fiftieth Anniversary meeting at Wheeling, October 8 and 9. The Ohio County Bar Association acted in the capacity of host. The daily business sessions of the Association, as well as its Annual Banquet, upon Thursday evening, October 8, were held in the Ball Room of the Fort Henry Club.

Mr. Wright Hugus, the President of the West Virginia Bar Association for the year 1936, declared the meeting in order. The Address of Welcome was given by Mr. Howard D. Matthews, President of the Ohio County Bar Association, and the response thereto was made by Mr. Robert S. Spilman, of the Kanawha County Bar.

The early portion of the forenoon session upon October 8 was consumed in the appointment of a Nominating, Resolutions and Auditing Committee and in the Reports of the Officers of the Association.

After these reports Hon. Frank W. Nesbitt, of Wheeling, made a remarkable address concerning "The Proposed Rules for Changes in Federal Practice." The Association was so impressed with Judge Nesbitt's paper that it passed a resolution authorizing the printing of the same for distribution to members of the Judiciary and to members of the Supervisory Committee of the Fourth Judicial District of the United States. The Courts and Committee now have the proposed rules for changes in Federal Practice before them for consideration.

HARRY H. BYRER
President, West Virginia Bar Association

Diploma Privileges Abolished at W. Va. University College of Law

During the afternoon session the various committees made their reports. There was considerable discussion in regard to the portion of the report of the Committee on Judicial Administration and Legal Reform recommending abolition of the diploma privileges at the College of Law of West Virginia University. At the conclusion of the discussion the Association voted in favor of the abolition of this privilege.

President Wright Hugus then made his address, in which he suggested the advisability of "State Bar Integration" for the State of West Virginia. The discussion following the President's address showed that he had chosen a topic of vital importance and that his treatment of it had been most informative.

The Nominating Committee then made its report, and after the ballot, President Hugus announced that Mr. Harry H. Byrer, of Martinsburg, Berkeley County, West Virginia, had been elected President of the Association for the year 1937.

Hon. Earl F. Reed, of Pittsburgh, Pennsylvania, was the guest speaker at the banquet on Thursday evening. Mr. Reed, in a very vivid manner, explained the practice in England in regard to newspaper comment in both civil and criminal actions, as contrasted with the practice prevalent in our country.

On Friday, at the morning session, there were other committee reports, at the conclusion of which Hon. Haymond Maxwell, one of the Judges of the West Virginia Supreme Court of Appeals, addressed the Association on "Instructions to Juries." Judge Maxwell has spent years presiding not only as a Supreme Court Judge but as Judge of one of the Circuit Courts of the State of West Virginia, and his long experience made his address most instructive.

After further committee reports, Hon. George W. McClintic, Judge of the United States District Court for the Southern District of West Virginia, and Hon. George W. Vanderoot, of the Wood County Bar, spoke on "Fifty Years at the West Virginia Bar."

The concluding Address was by Captain Kemble White, of the Marion County Bar, as to "Proposed Changes to the Judicial Article of the Constitution."—CHARLES P. MEAD, Sec.

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